Supreme Court, U.S.
FILED

97 1816 MAY 11 1998

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JAMES H. NEAL,

Petitioner,

v.

DISTRICT OF COLUMBIA
and
JOHN LATTIMORE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DANIEL M. SCHEMBER
GAFFNEY & SCHEMBER, P.C.
1666 Connecticut Avenue, N.W.
Suite 225
Washington, D.C. 20009
(202) 328-2244
Counsel of Record for Petitioner

May 11, 1998

Washington, D.C. • THIEL PRESS • (202) 328-3298

18 pp

QUESTIONS PRESENTED

1. Under *Sandin v. Conner*, 515 U.S. 472, 487 (1995), do prison rules create a constitutionally-protected liberty interest against administrative segregation if this confinement is (a) significantly more restrictive than housing in the general prison population; and (b) atypical, because neither it nor any similarly-restrictive confinement may be imposed on a discretionary basis?

2. Did the court below err in holding that prison rules can never create a liberty interest against any increased restraint that is "comparable" to the deprivation in *Sandin*?

PARTIES BELOW

The parties to the proceeding in the U.S. Court of Appeals for the District of Columbia Circuit were James H. Neal, plaintiff-appellant, and John W. Lattimore and the District of Columbia, defendants-appellees.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES BELOW ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS 1

STATEMENT OF THE CASE 1

Facts 2

District Court Opinion 4

Court of Appeals Opinion 4

REASON FOR GRANTING THE WRIT 5

The holding below that prison rules cannot create a liberty interest against any increase in restraint that is comparable to the deprivation in *Sandin* misconstrues the *Sandin* holding and conflicts with the decisions of other circuits. 5

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

Abbott v. McCotter,
13 F.3d 1439 (10th Cir. 1994) 8

Abdullah v. Roach,
668 A.2d 801 (D.C. 1995) 8, 9

Brooks v. DiFasi,
112 F.3d 46 (2d Cir. 1997) 10, 11

Brown v. Plaut,
131 F.3d 163 (D.C. Cir. 1997) 5, 12

Crosby-Bey v. District of Columbia,
786 F.2d 1182 (D.C. Cir. 1986) 3, 9

Keenan v. Hall,
83 F.3d 1083 (9th Cir. 1996) 10, 11

Lee v. Coughlin,
902 F. Supp. 424 (S.D.N.Y. 1995) 10

Luken v. Scott,
71 F.3d 192 (5th Cir. 1995) 11

Mackey v. Dyke,
111 F.3d 460 (6th Cir. 1997) 1s

Mathews v. Eldridge,
424 U.S. 319 (1976) 11

Meachum v. Fano,
427 U.S. 215 (1976) 7, 8

Miller v. Selsky,
111 F.3d 7 (2d Cir. 1997) 10

Sandin v. Conner,
515 U.S. 472 (1995) *passim*

Sealey v. Giltner,
116 F.3d 47 (2d Cir. 1997) 12

Superintendent, Mass. Correctional Inst., Walpole v. Hill, 472 U.S. 445 (1985) 11

Thomas v. Newkirk,
905 F. Supp. 580 (N.D. Ind. 1995) 10

Vaughn v. United States,
598 A.2d 425 (D.C. 1991) 8

Verrett v. Stempson,
623 A.2d 120 (D.C. 1993) 9

Wagner v. Hanks,
128 F.3d 1173 (7th Cir. 1997) 5

Whitford v. Boglino,
63 F.3d 527 (7th Cir. 1995) 10

Wolff v. McDonnell,
418 U.S. 539 (1974) 7, 8

Other Authorities:

D.C. Mun. Regs. title 28 2, 3

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit appears in the appendix ("App.") at 1a-8a and is reported at 131 F.3d 172. It is the only reported opinion. The district court's unreported opinions holding that local prison rules create a constitutionally-protected liberty interest appear at App. 17a-22a and 24a-40a. The district court's unreported opinion dismissing petitioner's complaint appears at App. 11a-15a.

JURISDICTION

The judgment of the court of appeals was entered December 16, 1997. The court's order denying rehearing was entered on February 9, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The applicable provisions, set forth in the appendix, App. 47a-54a, are the Due Process Clause, U.S. Const. amend. V; 42 U.S.C. §1983; and numerous legislatively-approved District of Columbia prison rules published in title 28, District of Columbia Municipal Regulations (DCMR).

STATEMENT OF THE CASE

Petitioner Neal, a medium-custody District of Columbia prisoner, filed in the district court a suit for damages under 42 U.S.C. § 1983. The court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). Neal claimed that prison officials had violated his Fifth Amendment right to due process by denying him immediate release on demand from voluntary protective custody, as prison rules required, thereby causing

him to suffer involuntary maximum-custody confinement for many months, without a finding of clear and present threat to his safety, as prison rules also required.

The district court held the prison rules create a constitutionally-protected liberty interest against confinement in involuntary protective custody, but dismissed the complaint pending determination by local courts whether the rules create a private right of action. The court of appeals rejected this reasoning, but affirmed the dismissal of the complaint. The appellate court held the prison rules do not create a liberty interest.

Facts

In March 1992, upon his arrival at the Lorton Maximum Security Facility from a federal institution, Neal chose to enter voluntary protective custody, a type of administrative segregation. On December 1, 1992, Neal requested in writing that he be released from protective custody into the general prison population. The applicable prison rule, 28 DCMR § 521.12 (1987), states:

> If a resident in voluntary protective custody provides ... a written statement that the resident no longer wishes to remain in protective custody, the resident *shall be released at once* from protective custody; Provided, that a resident who requests such release may be placed in involuntary protective custody under the provision of this chapter for such involuntary placement. [Emphasis added.]

Prison officials, however, ignored Neal's request for release from voluntary protective custody. Thus, they subjected him to *involuntary* protective custody. Under § 520.4 of the rules, a Lorton prisoner is "subject to placement in involuntary custody" only if the prisoner "is found to be in danger from a

clear and present threat to the resident's safety." Prison officials held Neal in involuntary protective custody for more than six months after December 1, 1992, without any finding that he faced "a clear and present threat" to his safety.

In the district court Neal proved, App. 67a, 72a-73a, and the court found, that his conditions of confinement in administrative segregation were "more restrictive ... than those in the general population" of the Lorton Maximum Security Facility and that "the conditions imposed on Plaintiff represented a significant deprivation from the conditions in the general population." App. 25a, 20a. The court of appeals already had so held in a previous case. *Crosby-Bey v. District of Columbia*, 786 F.2d 1182, 1183 (D.C. Cir. 1986) ("[b]oth disciplinary segregation and administrative segregation involve a substantial loss of liberty for the prisoner").

Neal also showed that the prison rules do not allow Lorton officials to impose any similarly restrictive confinement on a discretionary basis. Under the rules, any restrictive confinement in a maximum security cell is either disciplinary or administrative segregation. §§ 505.2, 521.3. This segregation may not be imposed unless a specific substantive standard is met.[1]

---

[1] Involuntary protective custody may be imposed only where "factual information" shows a "clear and present threat to the resident's safety." §§ 526.1 and 520.4. Prisoners in voluntary protective custody have the right to immediate release on demand. § 521.12. Other types of administrative segregation may be imposed only if factual information establishes one of two other circumstances ("definite escape risk" or "clear and present danger to the safety of others"). §§ 520.2, 520.3. Disciplinary segregation may be imposed only if factual information demonstrates that a prisoner has committed a specific disciplinary offense. § 500.

District Court Decision

Based on (1) the finding of "significant deprivation," (2) the right under the rules to immediate release from voluntary protective custody upon request, and (3) the rules' substantive restrictions on imposition of involuntary protective custody, the district court held that Neal had a liberty interest against confinement in involuntary protective custody and that prison officials had violated due process by confining him in involuntary protective custody for over six months without the finding required by the rules. App. 18a-21a. The district court rejected defendants' argument that *Sandin v. Conner*, 515 U.S. 472 (1995), precluded this holding. *Id.*

The district court, however, abstained from determining Neal's entitlement to damages. The court believed that his right to recover damages for the constitutional violation depended on whether local law recognizes a private right of action for damages under the prison rules. The court held the entire case should be dismissed without prejudice to enable Neal to seek determination of this question in the local courts. App. 14a-15a.

Court of Appeals Opinion

The court of appeals rejected the district court's reason for dismissing the case, App. 5a, but held that, under *Sandin*, the prison rules do not create a liberty interest. The court said the deprivation Neal had suffered when he was not released from protective custody into the Maximum Security Facility general population was "comparable to that at issue in *Sandin*." App. 7a. Though Neal's restrictive confinement had lasted more than six months, while the prisoner in *Sandin* had been segregated for only thirty days, the court found the two deprivations comparable because the degree of deprivation in *Sandin* had been greater.

The court based its holding solely on comparison of Neal's confinement to conditions in the Maximum Security Facility general population--the same comparison the district court had made, albeit with the opposite result. The court of appeals acknowledged, though, that the prison Classification Board had "recommended that Neal be moved to medium security custody." App. 3a. In the companion case, *Brown v. Plaut*, 131 F.3d 163 (1997), the court of appeals held that *Sandin* did not preclude a finding that medium custody Lorton prisoners have a liberty interest against transfer to administrative segregation in the Maximum Security Facility. Neal's rehearing petition, in addition to defending the district court's finding, pointed out that the court had overlooked this similarity in the situations of Neal and Brown.

In *Brown*, the court declined to decide the *Sandin* issue. It said that *Sandin* was "not clear," that its application "presents a number of difficulties" and "unsettled questions," that analysis in case law from the Second and Ninth Circuits has not been adopted by the Fifth Circuit, and that the Seventh Circuit has said that it would "welcome clarification" by the Supreme Court. 131 F.3d 169-170, *quoting Wagner v. Hanks*, 128 F.3d 1173, 1176 (7th Cir. 1997).

REASON FOR GRANTING THE WRIT

The holding below that prison rules cannot create a liberty interest against any increase in restraint that is comparable to the deprivation in *Sandin* misconstrues the *Sandin* holding and conflicts with the decisions of other circuits.

Contrary to the decision below, *Sandin v. Conner*, 515 U.S. 472 (1995), did not hold that a liberty interest created by law or rule must be one of various combinations of increases in degree and duration of restraint that are deemed--

somehow--sufficient to warrant constitutional concern. *Sandin* did not hold, for example, that thirty days' solitary confinement can never be a deprivation of liberty. The Court did not suggest that there is some minimum number of solitary confinement days greater than thirty that crosses a constitutional threshold for finding a liberty interest.

Nor did *Sandin* hold that courts should make rough comparisons of various combinations of increases in degree and duration of restraint--such as a six-month change from 30 per cent solitary confinement to 80 percent solitary confinement, compared to a thirty-day change from 30 per cent solitary confinement to 100 per cent solitary confinement--to determine whether the two increases are "comparable," and whether the particular increase at issue crosses an unspecified due-process-triggering threshold. *Sandin* involved no such analysis. The "comparability" analysis invented by the court below is erroneous--and absurd.

The proper analysis is found in the *Sandin* opinion. There, the Court held that a prisoner in Hawaii did not have a constitutionally-protected liberty interest against confinement in disciplinary segregation because, under Hawaii law, disciplinary segregation was not an "atypical, significant deprivation" of liberty. 515 U.S. at 486. The Court based this holding on two findings.

First, disciplinary segregation in Hawaii "mirrored those conditions imposed upon inmates in administrative segregation and protective custody." *Id.* Second, under Hawaii law, imposition of administrative segregation or protective custody was "totally discretionary." *Id.* Thus, since disciplinary segregation in Hawaii prisons "did not exceed similar, totally discretionary confinement," *id.*, the

Hawaii regulations on disciplinary segregation were "not designed to confer rights on inmates." *Id.* at 482.[2]

The rule adopted in *Sandin* compares challenged confinement to conditions prevailing in the most restrictive type of confinement that prison officials lawfully may impose in exercise of unfettered discretion. Under the Hawaii regulations in *Sandin* the most restrictive but totally discretionary confinement that prison officials could impose was administrative segregation and protective custody. Therefore, conditions in administrative segregation and protective custody were the proper bases for comparison. Since disciplinary segregation in Hawaii "mirrored" and did not "exceed" to any significant degree the restrictiveness of administrative segregation and protective custody, the *Sandin* Court held that Hawaii regulations defining circumstances warranting disciplinary segregation created no liberty interest, because prison officials could impose the same degree of confinement, though under different names, through exercise of unfettered discretion. *Id.* at 486.

Sandin was a straightforward application of the holding and reasoning of *Meachum v. Fano*, 427 U.S. 215, 228 n.4 (1976) (no liberty interest against prison transfer where "no ... law stripped officials of the discretion to transfer prisoners ... 'for whatever reason or for no reason at all' "). 515 U.S. 478-

---

[2] The *Sandin* holding was not based on comparison of the degree of confinement in disciplinary segregation to that in the general population in Hawaii prisons. Though the Court mentioned general population conditions, 515 U.S. 486 n.8, the Court's holding was that there could be no liberty interest against imposition of disciplinary segregation where this segregation "mirrored" and did not "exceed" to *any* significant degree "totally discretionary" administrative segregation and "totally discretionary" protective custody.

79. While following *Meachum*, *Sandin* expressly reaffirmed *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (state law created liberty interest against imposition of prison discipline revoking prison good time credits, where credits "were revocable *only* if the prisoner was guilty of serious misconduct") (emphasis added). 515 U.S. 477-78.[3]

The prison rules here are like the state statutes in *Wolff*, not the provisions in *Meachum* or *Sandin*. Unlike the Hawaii regulations in *Sandin*, the rules here do *not* allow Lorton officials to impose *either* disciplinary segregation, administrative segregation, *or* protective custody on a "totally discretionary" basis. Under the Lorton rules *none* of these types of restrictive confinement may be imposed unless a specific substantive standard is met.[4] In contrast to the finding in *Sandin* that Hawaii regulations did not confer rights on prisoners, the District of Columbia Court of Appeals consistently has held that the Lorton rules do confer rights on Lorton prisoners. *Abdullah v. Roach*, 668 A.2d 801 (D.C. 1995); *Vaughn v. United States*, 598 A.2d 425 (D.C. 1991). In *Abdullah*, moreover, the court expressly observed that the District of Columbia "may be reading *Sandin* too broadly." 668 A.2d at 809.

---

[3] The facts and holding in *Sandin* were similar to those in *Abbott v. McCotter*, 13 F.3d 1439 (10th Cir. 1994), where, as in *Sandin*, restrictive confinement identical to that challenged could be imposed on a totally discretionary basis. The *Abbott* court, a year before *Sandin*, reached the same conclusion announced in *Sandin*--prison regulations cannot create a liberty interest against a particular kind of confinement where equally restrictive conditions can be imposed on a totally discretionary basis.

[4] See n. 1, *supra*.

Since Lorton officials may remove prisoners from the general prison population *only* where a specific substantive standard is met, the proper base of comparison under the *Sandin* rule--to determine whether the Lorton prison rules create liberty interests against administrative or disciplinary segregation--is the restrictiveness of confinement in the Lorton general population.[5] Under the *Sandin* rule the question here is whether administrative segregation "mirrors" and does not "exceed" conditions of confinement for the general prison population.[6]

At Lorton, confinement in disciplinary or administrative segregation clearly "exceeds" and does not "mirror" the restrictivness of conditions in the general prison population. *Crosby-Bey v. District of Columbia*, 786 F.2d 1182, 1183 (D.C. Cir. 1986) ("[b]oth disciplinary segregation and administrative segregation involve a substantial loss of liberty for the prisoner"). The district court expressly and properly found, on the undisputed facts, App. 67a, 72a-73a, that Neal's unlawful confinement in involuntary protective custody was a "significant deprivation." App. 20a.

The court of appeals misconstrued *Sandin* when it rejected Neal's due process claim on the ground that the deprivation of his liberty was "comparable to that at issue in *Sandin*." In

---

[5] The *Abdullah* court noted this point. 668 A.2d at 809 n. 13.

[6] Even Lorton officials' discretion to house prisoners within the general population is not totally unfettered. Lorton prisoners have a right to proper custody classification to determine in *which* population they should be housed--the minimum, medium, or maximum custody population. *Verrett v. Stempson*, 623 A.2d 120 (D.C. 1993).

Sandin, there was no deprivation of liberty *at all* because the disciplinary segregation at issue "mirrored," and did not "exceed," administrative segregation that Hawaii prison officials could impose on a "totally discretionary basis." Under the Lorton rules, in contrast, prison officials cannot impose *any* segregation from the general prison population on a "totally discretionary basis." The deprivation of Neal's liberty exceeded, and did not mirror, the confinement that the officials had unrestricted discretion to impose.

Several post-*Sandin* decisions reject the holding of the court below and support the validity of petitioner's due process claim. *Brooks v. DiFasi*, 112 F.3d 46 (2d Cir. 1997) (confinement exceeding totally discretionary confinement and imposing a significant hardship requires due process); *Miller v. Selsky*, 111 F.3d 7 (2d Cir. 1997) ("*Sandin* did not create blanket rule that disciplinary confinement may never implicate a liberty interest"); *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996) (*Sandin* requires due process where there is a major difference between segregation and housing in the general population); *Whitford v. Boglino*, 63 F.3d 527 (7th Cir. 1995) ("*Sandin* implies that states may grant prisoners liberty interests in being in the general population ... if the conditions of confinement in segregation are significantly more restrictive that those in the general population"); *Thomas v. Newkirk*, 905 F. Supp. 580 (N.D. Ind. 1995) (denying motion to dismiss due process challenge to disciplinary segregation; under *Sandin*, prison regulations may create liberty interest against even a short period of disciplinary or administrative segregation; where "regulation proscrib[es] segregation absent specified predicates" whether segregation is atypical and significant hardship depends on "evidence as to the conditions of the various types of segregation [and] that of the general population"); *Lee v. Coughlin*, 902 F. Supp. 424 (S.D.N.Y. 1995) (awarding summary judgment and damages to prisoner held in lengthy administrative segregation on

assault finding reached in violation of due process; under *Sandin*, regulations created liberty interest). Under these precedents, and a proper analysis of *Sandin*, the Lorton prison rules create a liberty interest against confinement in involuntary protective custody.[7]

While this conclusion follows directly from the opinion in *Sandin*, the court below correctly noted, in the companion case, that the courts of appeals have divided on the issue:

> Caselaw from the Second and Ninth Circuits suggests that whether a term in segregation amounts to an "atypical and significant" deprivation turns on its length and on a comparison of conditions in segregation and in the prison's general population. *See, e.g., Brooks v. DiFasi*, 112 F.3d 46, 48-49 (2d Cir. 1997); *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996). Other courts have not adopted so structured an analysis; for instance, the Fifth Circuit has concluded that a term in administrative segregation was not "atypical and significant" without discussing conditions in the segregation unit or the length of the segregation at all. *See Luken v. Scott*, 71 F.3d 192, 193 (5th Cir. 1995), *cert.*

---

[7] This point is dispositive of Neal's constitutional claim, since the deprivation of his liberty occurred without any hearing or findings, and was supported by no evidence. Due process, at the very least, requires a meaningful opportunity to be heard and a determination, based on evidence, of whether the substantive condition for restricting liberty is met. *Superintendent, Mass. Correctional Inst., Walpole v. Hill*, 472 U.S. 445, 455 (1985) (in "variety of contexts" Court has held "loss of an important liberty interest violates due process if the decision is not supported by any evidence"); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'").

denied, 116 S. Ct. 1690 (1996). Were we to follow the approach of the Second and Ninth Circuits, we would then need to decide whether the length and severity of the deprivation Brown experienced sufficed to render that deprivation "atypical and significant," a close and difficult question. *Compare Sealey v. Giltner*, 116 F.3d 47, 51-52 (2d Cir. 1997) (remanding for specific findings on conditions of confinement in the case of an inmate held in administrative segregation for six months) with *Mackey v. Dyke*, 111 F.3d 460, 463 (6th Cir.), *cert. denied*, 139 L. Ed. 2d 84, 118 S. Ct. 136 (1997) (finding that a six-month term in administrative segregation was not "atypical and significant," with no discussion of conditions in segregation).

Brown v. Plaut, 131 F.3d 163, 170 (D.C. Cir. 1997). The Court should resolve this conflict among the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Daniel M. Schember
Gaffney & Schember, P.C.
1666 Connecticut Ave., N.W.
Suite 225
Washington, D.C. 20009
202/328-2244

Counsel of Record for Petitioner

May 11, 1998

Supreme Court, U.S.
FILED
97-1816 MAY 11 1998
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JAMES H. NEAL,

Petitioner,

v.

DISTRICT OF COLUMBIA
and
JOHN LATTIMORE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

DANIEL M. SCHEMBER
GAFFNEY & SCHEMBER, P.C.
1666 Connecticut Avenue, N.W.
Suite 225
Washington, D.C. 20009
(202) 328-2244
Counsel of Record for Petitioner

May 11, 1998

Washington, D.C. • THIEL PRESS • (202) 328-3288

77 pp

TABLE OF CONTENTS

A	Opinion of the Court of Appeals December 16, 1997 (Wald, J.) (rejecting District Court finding that local prison rules create liberty interest against administrative segregation; affirming dismissal of complaint)	1a
B	Judgment of Court of Appeals December 16, 1997 (Wald, Henderson and Garland, JJ.) (affirming judgment of District Court)	9a
C	District Court Memorandum July 16, 1996 (Sporkin, J.) (dismissing complaint without prejudice; holding damage claim should be addressed by local courts)	11a
D	District Court Order July 16, 1996 (Sporkin, J.) (dismissing complaint)	16a
E	District Court Memorandum Opinion November 21, 1995 (Sporkin, J.) (holding local prison rules create liberty interest against administrative segregation)	17a
F	District Court Order November 21, 1995 (Sporkin, J.) (denying motion for reconsideration)	23a

G	District Court Memorandum Opinion June 12, 1995 (Sporkin, J.) (finding existence of constitutionally protected liberty interest)	24a
H	District Court Order June 12, 1995 (Sporkin, J.) (dismissing cross-motions for summary judgment)	41a
I	Order of Court of Appeals February 9, 1998 (Wald, Henderson and Garland, JJ.) (denying rehearing)	43a
J	Order of Court of Appeals February 9, 1998 (Wald, Henderson and Garland, JJ.) (denying en banc review)	45a
K	Constitutional provisions, statutes and regulations	47a
L	Complaint for Violation of Civil Rights filed *pro se* July 14, 1994 (claiming violation of Due Process Clause and local prison regulations)	55a
M	Amended Complaint filed *pro se* September 16, 1994 (claiming violation of Fifth Amendment procedural due process)	62a
N	Statement of Material Facts Not Subject to Genuine Dispute filed November 11, 1994 in conjunction with Plaintiff's Motion for Partial Summary Judgment	65a

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 9, 1997 Decided December 16, 1997

No. 96-7187

JAMES H. NEAL,
APPELLANT

v.

DISTRICT OF COLUMBIA AND JOHN LATTIMORE,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 94cv01528)

Daniel M. Schember argued the causes and filed the briefs for appellant. *Alake Johnson-Ford* entered an appearance.

Mary L. Wilson, Assistant Corporation Counsel, argued the cause for the District of Columbia, with whom *Jo Anne Robinson*, Interim Corporation Counsel at the time the brief was filed, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief.

Jonathan J. Frankel argued the cause for *amicus curiae* American Civil Liberties Union of the National Capital Area, with whom *Stephen H. Sachs* and *Arthur B. Spitzer* were on the brief.

Before: WALD, HENDERSON and GARLAND, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* Wald.

WALD, *Circuit Judge*: This is a companion case to *Brown v. Plaut*, 1997 U.S. App. LEXIS 35282, No. 96-7027 (D.C. Cir. Dec. 16, 1997). Because our opinion in *Brown* addresses many of the same issues raised in this case, we will make frequent reference to that opinion.

Plaintiff James H. Neal ("Neal") was an inmate at the District of Columbia's (the "District's") prison at Lorton during all times relevant to this action. He seeks to recover damages from the District for holding him against his wishes and without due process in "voluntary protective custody," a regime of specially restricted custody for prisoners whose personal safety is in danger, for a period of six months. The district court dismissed Neal's action for reasons which we find are not persuasive; the District argues nonetheless this dismissal should be affirmed. We find that, under the analysis mandated by *Sandin v. Conner*, 515 U.S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995), Neal had no liberty interest in remaining free of the special conditions of detention imposed upon him, and therefore affirm the dismissal.

I. BACKGROUND

Neal was convicted in 1987 in D.C. Superior Court of a number of offenses, including multiple counts of robbery, and sentenced to 49 to 147 years' imprisonment. He was initially

placed at Lorton, then transferred to the federal prison in Leavenworth, Kansas, and later transferred back to Lorton in March 1992. The federal Bureau of Prisons transfer forms stated that Neal had a significant history of violence (he had allegedly tried to choke a prison guard) and that he should be considered an escape risk based on the length of his sentence. Accordingly, Neal was placed at Lorton's Maximum Security Facility, a decision that Neal says in a declaration filed in this action that he did not oppose. On March 31, 1992, at his initial hearing for housing classification at the Maximum Security Facility, Neal asked to be placed in voluntary protective custody to allow him to "become acquainted with the conditions and routine" at the facility. Prison officials obliged, and placed him in voluntary protective custody in Cellblock 1 of the Maximum Security Facility.

Voluntary protective custody is one species of administrative segregation; the other major category is involuntary protective custody, which is reserved for prisoners who present an escape risk or who pose a danger to themselves or others. D.C. Mun. Regs. tit. 28, §§ 521.4, 521.10, 521.11 (1987).[1] Prison regulations require that all placements in administrative segregation be reviewed every thirty days. *Id.*, § 527.1. Neal was scheduled for a review of his housing placement on April 30. When that review did not occur, and no other review was scheduled, he submitted written requests for a review in October and November 1992. On December 1, 1992, he submitted a written request for "placement in general population." On March 24, 1993, the Classification Board, charged with reviewing prisoners' custody levels, recommended that Neal be moved to medium

---

[1] Administrative segregation may also be used to hold an inmate prior to a housing hearing or adjustment hearing. *Id.*, § 521.2.

security custody, but, for reasons unknown, this recommendation was never implemented. Neal wrote letters on March 29 and April 11, 1993, complaining that he had not received appropriate reviews of his placement in protective custody, and asserting that he wished to be moved to the general population at the Maximum Security Facility. On June 21, 1993, Neal was stabbed, and removed from the prison to an outside hospital. On his return to the prison, Neal voluntarily entered protective custody for a time, and then was returned to the general population of the Maximum Security Facility.

Neal filed a pro se complaint on July 14, 1994, claiming that the District's failure to release him from protective custody for six months violated the Due Process Clause and the D.C. regulations. (These regulations are referred to by the parties by the name of the statute approving them, the Lorton Regulations Approval Act ("LRAA").) The District filed a motion to dismiss or in the alternative for summary judgment on a number of grounds, one of which was that the LRAA did not create a private right of action. The district court denied the motion on all counts. It noted, however, that the question of whether the LRAA created a private right of action was a complex one, and requested further briefing.

While Neal's case was pending, the Supreme Court decided *Sandin v. Conner*, 515 U.S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995), finding that state laws and regulations governing prisons may only create a liberty interest for due process purposes if the alleged deprivation constitutes "atypical and significant hardship." *Id.* at 484. The parties filed supplemental pleadings as to *Sandin*'s application to Neal's case, and the district court found that, on the basis of a comparison between conditions in protective custody and those in the general population at the Maximum Security

Facility, the conditions Neal had experienced in protective custody did amount to an atypical and significant hardship.

The district court then issued a memorandum deciding the LRAA question. It concluded that the question of whether the LRAA gives rise to a private cause of action was "complex" and that no court to date had awarded damages based on an LRAA violation. The district court stated that Neal had conceded that, absent the LRAA, he would not be able to bring a section 1983 action. It then found that comity dictated that the District of Columbia's courts be allowed to decide whether the LRAA creates a private right of action in the first instance, and dismissed Neal's entire suit. *See Neal v. District of Columbia*, 931 F. Supp. 16, 17 (D.D.C. 1996). Neal appeals from this order.

II. ANALYSIS

On appeal, the District presents a number of arguments for affirming the district court's decision to dismiss Neal's section 1983 action. The most serious is that, under *Sandin*, 515 U.S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995), Neal did not have a liberty interest in avoiding his placement in administrative segregation. Because we agree with this one, we do not reach the others.

Before addressing *Sandin*, however, we briefly discuss the reasons given by the district court for its decision. The district court mistakenly assumed that, if a state law does not create a private cause of action, then it cannot support an action under section 1983. But to bring an action under section 1983 for a violation of the Due Process Clause, Neal need only establish that he has been deprived of a protected interest (here, a liberty interest) without due process. Under the law as it stood before *Sandin* was decided, Neal could have demonstrated this by showing that the relevant state laws and

regulations sufficiently constrained the discretion of state officials to establish the existence of a liberty interest. *See Brown*, slip op. at 9. Since *Sandin*, Neal must show that he has been subjected to an "atypical and significant hardship ... in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484.[2] At neither time, however, did the test for the existence of a liberty interest turn on whether the relevant state laws create a private cause of action.

We now turn to *Sandin*. In the companion *Brown* case, we concluded that the application of *Sandin* raised difficult questions which we thought it unnecessary to answer. In this case, we need not reach those questions, as Neal cannot establish the existence of a liberty interest under any plausible reading of *Sandin*.

Neal avers that he involuntarily spent six months in "voluntary" protective custody, beginning at the point he asked in writing on December 1, 1992, to leave voluntary protective custody, and ending when he left the administrative segregation unit on June 21, 1993, for the hospital.[3] In

---

[2] As we note in *Brown*, after *Sandin* Neal might still need also to show that relevant state laws and regulations contain language constraining the discretion of state officials. *See Brown*, slip op. at 12.

[3] The LRAA states that a prisoner in voluntary protective custody who makes a written request to leave that status "shall be released at once from protective custody." D.C. Mun. Regs. tit. 28, § 521.12 (1987). The LRAA permits an inmate who asks to leave voluntary protective custody to be placed instead in involuntary protective custody if findings are made that the inmate is a danger to himself or others or presents an escape risk. *See id.*, §§ 521.4, 521.12. The District does not contend that any such findings were made.

Cellblock 1, where Neal was held during that period, he was allowed to leave his cell for nine hours a day three days a week, for six and a half hours (or longer if he had a visitor) for two days a week, and for five and six hours respectively on the remaining two days. He was allowed a total of eight hours a week outdoors, in a small courtyard. He did not have easy access to the gym, mailroom, law library, or medical unit (although other arrangements were made for provision of these services), and he could not work at a prison job.

Neal contends that the appropriate standard for determining whether the deprivation he suffered was "atypical and significant" is to compare his circumstances to those of the general prison population from which he was removed. *Cf. Brown*, slip op. at 10-12. Even by that standard, however, Neal fails to meet the *Sandin* test. Had he remained a part of the general population at the Maximum Security Facility, Neal would have received at least 141/2 hours a day of out-of cell time, and 171/2 hours on Fridays and Saturdays. He would have been allowed 14 hours a week outdoors, some 22 hours a week of work, and easy access to the gym, mailroom, law library, and medical unit. His placement in administrative segregation thus cost him approximately half of his out of-cell time, eliminated his access to employment, and restricted his access to prison facilities, all over a six-month period. This deprivation is comparable to that at issue in *Sandin*; although the deprivation in *Sandin* lasted only thirty days, it was considerably more severe, involving (for instance) a reduction from between eight and twelve hours a day of out-of-cell time to fifty minutes. *Sandin*, 515 U.S. at 486 & n.8. It follows that, even under the reading of *Sandin* he himself proposes, Neal had no liberty interest in avoiding his treatment at the hands of Lorton's authorities, and so has no claim under the

Due Process Clause. We therefore affirm the dismissal of Neal's due process claim.[4]

There remains Neal's claim under the LRAA. Although it is unclear on what basis the district court originally dismissed this claim, Neal concedes that, if the district court's dismissal of his section 1983 claim was proper, it would also have been proper for the district court to dismiss his claim under D.C. law for lack of jurisdiction. *See* 28 U.S.C. § 1367(c)(3).[5] We thus affirm the district court's dismissal of this claim.

The decision of the district court is therefore affirmed.

So ordered.

---

[4] Although we find that the District's alleged treatment of Neal does not rise to the level of a violation of the Constitution, that does not mean that we endorse it. We do not know from the record whether the District had any valid reason for keeping Neal for six months in "voluntary" protective custody against his will, and why it denied him any process at all.

[5] Neal may, of course, pursue his LRAA claim in the courts of the District of Columbia. Dismissals for lack of supplemental jurisdiction are without prejudice, and the limitations period for a claim dismissed for this reason is tolled "while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. § 1367(d).

APPENDIX B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MANDATE
Pursuant to the provisions of
Fed. R. App. Pro 41(a)
ISSUED: 2/19/98
BY: E. Brown, Deputy Clerk

No. 96-7187 **September Term, 1997**

James H. Neal,

Appellant

v.

District of Columbia and John Lattimore,

Appellees

United States Court of Appeals
For the District of Columbia Circuit
FILED DEC 16 1997

Appeal from the United States District Court
for the District of Columbia
(No. 94cv01528)

Before: WALD, HENDERSON and GARLAND, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Deputy Clerk

Date: December 16, 1997

Opinion for the Court filed by Circuit Judge Wald.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED JUL 16 1996
Nancy Mayer-Whittington,
Clerk U.S. District Court

JAMES NEAL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 94-01528
DISTRICT OF COLUMBIA, et al.	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on Defendants' motion for summary judgment. Plaintiff brought suit against the District of Columbia and John Lattimore, Administrator of Lorton under 42 U.S.C. § 1983. He alleged that Defendants violated his rights under the Fourteenth Amendment by holding him in involuntary protective custody after he had requested to be released from voluntary protective custody

without making a determination that he was either an escape risk, a threat to others or faced a threat from others.[1]

Plaintiff also brought state claims alleging that the two defendants are jointly and severally liable under the Lorton Regulation Approval Act of 1982 ("LRAA") for holding him in administrative segregation without making the necessary findings and for failing to provide both an initial hearing and periodic housing reviews.

Plaintiff alleges that defendants Lattimore and the District are jointly and severally liable for holding him in involuntary protective custody from December 1, 1992 to June 21, 1993 without making the appropriate findings required by the LRAA.[2] and that defendants Lattimore and the District are jointly and severally liable under LRAA § 207 for holding him in involuntary protective custody from April 30, 1992 (the date Neal was supposed to receive his first periodic housing review after his initial placement in administrative segregation) to June 21, 1993 without holding periodic housing hearings.

---

[1] Plaintiff had requested on December 1, 1992 to be released from protective custody. He alleges that he was improperly held until June 21, 1993.

[2] Plaintiff specifically alleges violations of LRAA §§ 200.4, 201.7 see supra and 206.1 ("If, after a hearing, the Board determines that the resident should be placed in segregation the Board must prepare within three (3) working days of the hearing, a written statement containing the Board's decision and the factual information upon which the decision is based.")

On June 12, 1995, this Court handed down a Memorandum Opinion and Order in this matter. In that decision, the Court examined the issue of whether the LRAA creates a private right of action:

> Neither party has adequately briefed the state law questions. It is not clear whether the LRAA even creates a private right of action. If the LRAA does create a private right of action, the parties have not addressed whether plaintiff must exhaust any administrative procedures before bringing a claim under the LRAA. Until the parties address these questions, the Court cannot determine whether Mr. Neal has a state law cause of action and, if so, whether this court will exercise supplemental jurisdiction under 28 U.S.C. §1367. (Mem. Op. at p. 17)

The Court directed the parties to fully brief these issues. After reviewing the oral and written submissions of both parties, the Court is not satisfied that the parties have adequately addressed this issue. This is through no fault of the parties. The issues before this Court are complex. To date, no court has awarded damages based on a violation of the LRAA or even decided the issue of whether damages are available under the LRAA. (Plaintiff's Reply Brief at p. 3). The D.C. Council has recently adopted a resolution clarifying its intent in passing the LRAA, by noting that even injunctive relief should not be available (except in certain limited circumstances not applicable here) for LRAA violations. See Resolution 11-198 In the Council of the District of Columbia January 4, 1996) Indeed, in a recently decided case, the Court of Appeals of this circuit has held that the LRAA does not "give rise to a protected liberty interest..." Blango v. Barry, No. 95-7130 (D.C. Cir., May 9, 1996).

Plaintiff's case is based squarely upon the LRAA, a regulation enacted by the Council of the District of Columbia. Without this regulation, Plaintiff conceded that he would have no standing to bring his Section 1983 action. The District of Columbia passed, implemented and enforces the LRAA. Comity strongly weighs in favor of having the District of Columbia Courts in the first instance interpret the LRAA and decide whether the District of Columbia intended to create a private right of action, and if so, what remedies, monetary or otherwise, are available to aggrieved parties.

Accordingly, the case will be dismissed in order to allow the Plaintiff to pursue his cause of action through the District of Columbia's administrative or judicial processes. This Court fears that if it enters the fray at this stage, the Federal Courts will be flooded with untold numbers of prisoner damage cases alleging violations of the LRAA, a creation of local government.[3] The District of Columbia has a fair and impartial court system created under Article One of the Constitution of the United States. It is the appropriate forum to decide the issues presented in this matter and award damages under appropriate circumstances.

CONCLUSION

Since Plaintiff's action is cognizable in Federal Court solely because of the LRAA, a regulation adopted by the Council of the District of Columbia, the prudent course to follow in this case is to refrain from becoming a prisoners "damage court" and allow the Courts and the administrative processes of the District of Columbia to deal with prisoner damage claims arising under the LRAA. Plaintiff's action will be dismissed to

---

[3] The Court's decision in this matter is limited to after the fact damage actions.

allow him to pursue his claim for damages through the District of Columbia's judicial and administrative processes.

DATE: 7/16/96

/s/ Stanley Sporkin
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED JUL 16 1996
Nancy Mayer-Whittington,
Clerk U.S. District Court

JAMES NEAL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 94-01528
DISTRICT OF COLUMBIA, et al.	)	(Stanley Sporkin)
	)	
	)	
Defendants.	)	

ORDER

For the reasons stated in its memorandum opinion of this date, the Court hereby

ORDERS that Plaintiff's Complaint be **DISMISSED**, without prejudice.

DATE: 7/16/96

/s/ Stanley Sporkin
United States District Court

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED NOV 21 1995
Nancy Mayer-Whittington,
Clerk U.S. District Court

JAMES NEAL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 94-01528
DISTRICT OF COLUMBIA, et al.	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on Defendants' motion for reconsideration. Plaintiff brought suit against the District of Columbia and John Lattimore, Administrator of Lorton under 42 U.S.C. § 1983. He alleged that Defendants violated his rights under the Fourteenth Amendment by holding him in involuntary protective custody after he had requested to be released from voluntary protective custody without making a

determination that he was either an escape risk, a threat to others or faced a threat from others.[1]

Plaintiff also brought state claims alleging that the two defendants are jointly and severally liable under the Lorton Regulation Approval Act of 1982 ("LRAA") for holding him in administrative segregation without making the necessary findings and for failing to provide both an initial hearing and periodic housing reviews. On June 12, 1995, this Court handed down a Memorandum Opinion and Order in this matter. In that decision, the Court held that the Plaintiff had identified a Constitutionally protected liberty interest and ordered the parties to brief the remaining issue of whether the LRAA created a private right of action such that the Defendants may be held liable for monetary damages under 42 U.S.C. § 1983.

On June 19, 1995, the Supreme Court issued its decision in Sandin v. Conner, et al., 115 S. Ct. 2293 (1995). That decision altered the analysis used in examining whether or not a state prison regulation creates a liberty interest recognized by the Constitution. There are two issues before the Court; 1) Does the Supreme Court's analysis of 14th Amendment liberty interests in Sandin require this Court to revise its Memorandum Opinion and Order issued in this matter and 2) Whether the LRAA creates a Private Right of Action.

ANALYSIS

I) Defendant's Motion for Reconsideration

---

[1] Plaintiff had requested on December 1, 1992 to be released from protective custody. He alleges that he was improperly held until June 21, 1993.

Defendants argue that the decision in Sandin removes any federal liberty interest in "any housing classification at the maximum security facility" (emphasis in the original). This Court finds nothing in the Sandin decision that compels it to disturb the original Memorandum Opinion. In Sandin the Supreme Court said:

> We hold that [plaintiff's] discipline in segregated confinement, did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest. The record shows that, at the time of [plaintiff's] punishment, disciplinary segregation, *** mirrored those conditions imposed upon inmates in administrative segregation and protective custody. *** [Plaintiff's] confinement did not exceed similar, but totally discretionary confinement in either duration or degree of restriction" Sandin at 2301

Sandin is readily distinguishable. Unlike the plaintiff in Sandin, the Plaintiff before this Court was not subject to disciplinary segregation of any kind. On March 31, 1992, Plaintiff had his initial classification hearing at Lorton. At **Plaintiff's request**, he was placed in administrative segregation in Cellblock #1.[2] In Sandin, the Supreme Court compared disciplinary segregation with administrative segregation and protective custody. This Court must compare improper administrative segregation with the

---

[2] Lorton Regulations Approval Act of 1982 (LRAA) §201.6 states, "Voluntary protective custody is the placement of a resident in administrative segregation at the request of the resident."

conditions of the general prison population. Prisoners in administrative segregation[3] face more restrictive conditions than those in the general population. They spend more hours per day confined in their cell and fewer hours out of doors. In addition, while general population prisoners may leave their cells to work, administrative segregation prisoners may not. Thus, the conditions imposed on Plaintiff represented a significant deprivation from the conditions in the general population.

In addition, in Sandin, imposition of the segregation in question "mirrored" administrative segregation or protective custody that was "totally discretionary." This is not the case here. LRAA § 201.7 provides:

> If a resident in voluntary protective custody provides the Department with a written statement that the resident no longer wishes to remain in protective custody, the resident shall be released at once from protective custody; Provided, that a resident who requests such a release may be placed in involuntary protective custody under the provision of this chapter for such involuntary placement.

(emphasis added). LRAA § 201.2 states that "[n]o resident may be held in administrative segregation for more than three (3) days without a hearing except as specifically provided in this chapter." Looking at LRAA § 201.2 and § 201.7 together, it is clear that a prisoner who requests release from

---

[3] Both voluntary and involuntary protective custody are forms of administrative segregation. LRAA §§ 201.5 and 201.6. Prisoners in administrative segregation are held separately from those in the general prison population.

voluntary protective custody may not be held in involuntary protective custody for more than three days without receiving a hearing.

The LRAA establishes certain conditions that must be met before a resident may be held involuntarily in administrative segregation. A resident may not be placed involuntarily in administrative segregation unless he is found to be a "clear and present danger to the safety of others," or a "definite escape risk," or if the resident is "found to be in danger from a clear and present threat to the resident's safety," LRAA §§ 200.2, 200.3 and 200.4. In addition, LRAA § 202.4 further specifies how to determine if a resident is a "clear and present danger to others," or "is in danger from a clear and present threat from others." LRAA § 202.5 sets forth certain specific means by which a resident may be found to be an escape risk (e.g. "The resident possessed instruments designed for use in an escape.")

LRAA § 207.1 calls for thirty day placement reviews for residents in administrative segregation and LRAA § 207.3 permits the resident to be present at every third review (i.e. every ninety days). Despite these rules, plaintiff received no review of his placement in administrative segregation from March 31, 1992 through mid-June, 1993.

The LRAA does give the housing board some discretion in <u>how</u> it determines whether the resident is an escape risk. But the housing board must still determine that the defendant is an escape risk. Thus, the regulations at issue here require that certain procedures must be followed. They were not followed in this case.

CONCLUSION

The Court finds that because Plaintiff was not subject to disciplinary segregation and the LRAA procedures used for determining whether to continue administrative segregation were non-discretionary, Sandin is distinguishable. Defendants' motion for reconsideration will be denied.

A Status Conference will be called in this matter to determine how to proceed with the Plaintiff's remaining claims under §1983 and state law.

DATE: 11/20/95

/s/
Stanley Sporkin
United States District Court

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
NOV 21, 1995
Nancy Mayer-Whittington,
Clerk U.S. District Court

JAMES NEAL	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 94-1528
DISTRICT OF COLUMBIA, et al.	)	(Stanley Sporkin)
	)	
	)	
Defendants.	)	

ORDER

For the reasons stated in its memorandum opinion of this date, the Court hereby

ORDERS that Defendants' motion for reconsideration be **DENIED**.

DATE: 11/20/95

/s/
Stanley Sporkin
United States District Court

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JUN 12, 1995
Clerk U.S. District Court
District of Columbia

JAMES NEAL	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 94-1528
DISTRICT OF COLUMBIA, et al.	)	(Stanley Sporkin)
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on plaintiff's motion for summary judgment and defendants' motion to dismiss, or in the alternative for summary judgment. There are two main issues in this case: 1) does the Lorton Regulations Approval Act of 1982 ("LRAA") create a Constitutionally protected liberty interest in a prisoner's being placed in and released from administrative segregation, and 2) whether there was a custom or policy by the District of Columbia that violated that interest.

For the reasons outlined below, the Court finds that the LRAA does create a Constitutionally protected liberty interest

that must be observed in placing and releasing prisoners from administrative segregation. The Court finds it cannot decide on summary judgment, based on the record before it, whether there was a "pattern or practice" such that the District may be held liable for monetary damages under 42 U.S.C. § 1983.

I. Background

Plaintiff is serving consecutive sentences for his DC Superior Court convictions for robbery and unauthorized use of a vehicle. On March 16, 1992 it was recommended that plaintiff be transferred from the Occoquan facility to Lorton, a maximum security facility. On March 31, 1992 plaintiff had his initial classification hearing at Lorton and was placed in administrative segregation in Cellblock #1 on his request.[1]

Prisoners in administrative segregation[2] face more restrictive conditions than those in the general population. They spend more hours per day confined in their cell and fewer hours out of doors. In addition, while general population prisoners may leave their cells to work, administrative segregation prisoners may not.

LRAA § 207.1 calls for thirty day placement reviews for residents in administrative segregation and LRAA § 207.3

---

[1] Lorton Regulations Approval Act of 1982 (LRAA) § 201.6 states, "Voluntary protective custody is the placement of a resident in administrative segregation at the request of the resident."

[2] Both voluntary and involuntary protective custody are forms of administrative segregation. LRAA §§ 201.5 and 201.6. Prisoners in administrative segregation are held separately from those in the general prison population.

permits the resident to be present at every third review (i.e. every ninety days). Despite these rules, plaintiff received no review of his placement in administrative segregation from March 31, 1992 through mid-June, 1993.[3]

In October, 1992 plaintiff began submitting monthly requests to the hearing board for a 30 or 90 day review. Defendants held no hearing. On December 1, 1992 plaintiff submitted another request in which he not only asked for a housing review, but he also stated that he would "like to be reviewed for possible placement in general population." Pl's Motion for Partial Summary Judgment Ex. 3. On January 5, 1993 plaintiff even more explicitly requested that he "be released from segregation."[4]

LRAA § 201.7 states:

> If a resident in voluntary protective custody provides the Department with a written statement that the resident no longer wishes to

---

[3] The Classification Board reviewed plaintiff's custody level on March 24, 1993 and found that he should remain in maximum security. No consideration was given to plaintiff's request to be removed from administrative segregation. Declaration of James Neal ¶ 22.

[4] Plaintiff submitted a request for a housing review and release from administrative segregation again in February 1993. In March of 1993 he submitted a similar written request to Administrator John W. Lattimore and spoke with him in person about it at sick call. On April 11, 1993 plaintiff submitted a written grievance regarding his failure to receive 30 and 90 day housing reviews. Defendants did not provide a hearing in response to plaintiff's requests or his grievance.

> remain in protective custody, the resident shall be released at once from protective custody; Provided, that a resident who requests such a release may be placed in involuntary protective custody under the provision of this chapter for such involuntary placement.

On March 24, 1993 the classification board reviewed plaintiff's custody level. The board did not, however, consider whether plaintiff was entitled to his request to be released from his administrative segregation pursuant to LRAA § 201.7.

Plaintiff went to D.C. General Hospital on June 21, 1993. When he returned, he was placed in protective custody. At his October 12, 1993 hearing plaintiff and the Housing Board determined that he should be released from administrative segregation and returned to the general population.

II. Analysis

Plaintiff has brought suit against the District of Columbia and John Lattimore, Administrator of Lorton under 42 U.S.C. § 1983. He alleges that defendants violated his rights under the Fourteenth Amendment by holding him in involuntary protective custody after he had requested to be released from voluntary protective custody without making a determination that he was either an escape risk, a threat to others or faced a threat from others.[5] Plaintiff also brings pendent state claims alleging that the two defendants are jointly and severally liable under the LRAA for holding him in administrative segregation

---

[5] Plaintiff had requested on December 1, 1992 to be released from protective custody. He alleges that he was improperly held until June 21, 1993.

without making the necessary findings and for failing to provide both an initial hearing and periodic housing reviews.

II A.

Defendants, relying on Graham v. Broglin, 922 F.2d 379 (7th Cir. 1991), initially argue that plaintiff's suit for damages under Section 1983 should be dismissed because the proper remedy is through a habeas corpus petition. Defendants are mistaken. The Supreme Court recently clarified the boundaries between claims properly brought under § 1983 and those that must be brought in a petition for habeas corpus. See Heck v. Humphrey, 114 S. Ct. 2364, 2369-72 (1994). The Heck Court held

> [W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed.

114 S.Ct. at 2372-73 (emphasis in original; footnotes omitted). Plaintiff is not challenging the validity of his sentence or any part of it. He is instead seeking damages for remaining in administrative segregation because of an alleged due process violation. Because "a judgment in favor of the plaintiff would [not] necessarily imply the invalidity of his

conviction or sentence," his claim is properly brought under § 1983. See id.

II. B. Fourteenth Amendment Liberty Interests

Fourteenth Amendment liberty interests may come from the Due Process Clause itself or from state law. See Hewitt v. Helms, 459 U.S. 460, 466 (1983). No liberty interest in placement and release from administrative segregation arises directly from the Constitution. Cf. id. at 467 ("[O]ur decisions have consistently refused to recognize more than the most basic liberty interests in arising directly from the Constitution); see also Bailey v. Shillinger, 828 F.2d 651, 652 (10th Cir. 1987) ("Classification of the plaintiff into administrative segregation does not involve deprivation of a liberty interest independently protected by the Due Process Clause.")

The question then is whether the LRAA creates such a Constitutionally protected interest. The Supreme Court set forth the general test for determining whether state law or regulations create a liberty interest in Hewitt and Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454 (1989). First, the regulations must contain "explicitly mandatory language." Thompson, 490 U.S. at 463. Specific procedural guidelines do not in and of themselves create a liberty interest even if the state law makes those procedures mandatory. Hewitt, 459 U.S. at 471. The state law must both establish mandatory procedures and also forbid a certain outcome (e.g. transfer to administrative segregation) absent certain specified substantive predicates being met. Id. In other words, unless the state requires that a prisoner cannot be placed in administrative segregation without a finding that the prisoner meets specified substantive predicates, state law does not create a liberty interest in being released from administrative segregation. See, e.g., Slezak v. Evatt, 21 F.2d 590, 594-95

(4th Cir.), cert denied, 115 S.Ct. 235 (1994). Finally, even if the state law sets forth specified substantive predicates that must be met, "if . . . the primary decisionmaker or any reviewing authority is authorized to override, as a matter of discretion, any classification suggested by application of the prescribed substantive criteria," state law creates no liberty interest. Id. at 595 (emphasis added, citations omitted).

The LRAA makes certain procedures mandatory before a prisoner who requests release from voluntary administrative segregation may be held involuntarily. LRAA § 201.7 provides:

> If a resident in voluntary protective custody provides the Department with a written statement that the resident no longer wishes to remain in protective custody, the resident shall be released at once from protective custody; Provided, that a resident who requests such a release may be placed in involuntary protective custody under the provision of this chapter for such involuntary placement.

(emphasis added). LRAA § 201.2 states that "[n]o resident may be held in administrative segregation for more than three (3) days without a hearing except as specifically provided in this chapter." As with the regulations cited in Hewitt, the LRAA establishes certain mandatory procedures. Looking at LRAA § 201.2 and § 201.7 together, it is clear that a prisoner who requests release from voluntary protective custody may not be held in involuntary protective custody for more than three days without receiving a hearing.

The LRAA also establishes certain specified substantive predicates that must be met before a resident be held involuntarily in administrative segregation. A resident may

not be placed involuntarily in administrative segregation unless he is found to be a "clear and present danger to the safety of others," or a "definite escape risk," or if the resident is "found to be in danger from a clear and present threat to the resident's safety," LRAA §§ 200.2, 200.3 and 200.4. The Court finds that these are in and of themselves specific substantive predicates. They are just as specific as those the Supreme Court considered in Hewitt. 459 U.S. at 471 n.6 ("[T]he need for control" and the threat of a serious disturbance" found to be specific substantive predicates.) In addition, LRAA § 202.4 further specifies how to determine if a resident is a "clear and present danger to others," or "is in danger from a clear and present threat from others." LRAA § 202.5 sets forth certain specific means by which a resident may be found to be an escape risk (e.g. "The resident possessed instruments designed for use in an escape.")

Defendants, relying on Abbott v. McCotter, 13 F.3d 1439 (10th Cir. 1994), argue that because LRAA § 202.5 also allows the housing board to consider "other relevant evidence reasonably showing the resident to be an escape risk," the substantive predicate is not definite enough to create a liberty interest. The Court disagrees. The regultions in Abbott are very different from the LRAA. In Abbott, one of the five predicates for placing a prisoner in administrative segregation is "when circumstances make it necessary." The inclusion of this "catch-all" predicate allows prison officials broad discretion. The LRAA lists three specific predicates and reserves no general authority as in Abbott. The LRAA does give the housing board some discretion in how it determines whether the resident is an escape risk. But the housing board must still determine that the defendant is an escape risk, which is a specific predicate.

Defendants rely on cases from other Circuits, which have held that prison regulations do not establish a protected

liberty interest. The regulations in those cases, however, are quite different from the LRAA. In Pardo v. Hosier, 946 F.2d 1278 (7th Cir. 1991) the prison regulations established mandatory procedures, but did not set forth specific substantive predicates. The regulations simply state that "incidents occur which, in the interest of institutional security and safety, require that a resident be . . . placed in a holding unit." Id. at 1281. Unlike the LRAA, there are no specified substantive predicates that restrict officials' discretion. The regulations in Kulow v. Nix, 28 F.3d 855 (8th Cir. 1994) bear no resemblance to the LRAA regulations on administrative segregation. In that case, the prison committee could determine that a prisoner be held in involuntary protective custody for their own protection "for any valid reason." Id. at 858. The LRAA has no provision that gives the housing board such broad discretion.

Finally, defendants argue that the Court should rely on the reasoning in Slezak v. Evatt, supra. In Slezak, the Court found that there was no liberty interest created by the prison regulations. Although the regulations contained both substantive predicates and mandatory language, the regulations also called for additional levels of review after the housing board made its recommendation.

Defendants claim that the LRAA is akin to the regulations in Slezak because the warden may in his or her discretion, override the Housing Board's decision. Defendants rely on a housing board form that contains notation for a "discretionary override." No provision in the LRAA calls for any such discretionary override or discretionary review of the housing board's decision. If officials at Lorton are using this "override" procedure, it is not called for by state law. The exercise of discretion not called for by state law does not support defendants' argument that the LRAA does not create a liberty interest in release from administrative segregation.

It is true that prisoners may appeal the decision of the housing board to the Administrator. LRAA § 209.1 No provision in the LRAA would support the claim that this additional level of review increases official discretion. The regulations are clear that absent certain substantive predicates a prisoner may not be placed in administrative segregation. Because the LRAA does not indicate otherwise, this Court must assume that Administrator is as constrained on appeal by the specified predicates as the housing board is. See Byrd v. District of Columbia, 92cv608, p. 13 n.6 (D.D.C., Sept. 24, 1993 unpublished memorandum opinion, Lamberth, J.)

The LRAA contains mandatory language and establishes specific substantive predicates. Prisoners who do not meet those substantive predicates are not to be placed in administrative segregation. The Court therefore concludes that plaintiff has identified a Constitutionally protected liberty interest in being placed in and released from administrative segregation.[6]

II. C. Municipal Liability Under Section 1983

Plaintiff has included the District of Columbia as a defendant.[7] The District may be held liable for money

---

[6] The Court need not reach the issue of what procedures plaintiff was entitled to. In this case, it is undisputed that he received no procedural protections at all.

[7] It is not clear from the complaint whether plaintiff is also suing defendant Lattimore in his official capacity. The Court will assume that he is. Such a suit is to be treated as a suit against the District of Columbia. See Kentucky v. Graham, 473 U.S. 159, 166 (1985).

damages under § 1983 if "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted by [the District]'s officers." Monell v. Department of Social Services, 436 U.S. 658, 690 (1978). In other words, the District may not be held liable simply on a respondeat superior basis for the actions of its non-policymaking officials. The municipality must be a "moving force" behind the violation. Kentucky v. Graham, 473 U.S. 159, 166 (1985) (citations omitted).

There are a number of ways that the plaintiff could show that the District is responsible under § 1983 for the actions of defendant Lattimore. The LRAA appears to set forth the official written policy of the District governing the holding of prisoners in involuntary protective custody. If, however, Administrator Lattimore "possesse[d] final authority to establish municipal policy with respect to the action ordered," the District would be liable for his knowing decision to hold plaintiff in administrative segregation without determining whether the plaintiff met the LRAA substantive predicates. See Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986).

Second, if plaintiff showed that there was a widespread and longstanding practice at Lorton to hold prisoners in administrative segregation without making the findings required by the LRAA, that could establish that the practice was authorized by policymaking officials even though the practice was not set forth in a written law or policy. See City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988).

The decision as to whether an official has final policymaking authority is a matter of state law. See Jett v. Dallas Independent School Dist., 491 U.S. 701, 737 (1989). Neither party has addressed whether or not the Lorton Administrator has such authority. However, the LRAA is District of Columbia law, and it explicitly addresses the

placement of prisoners in administrative segregation. Because the plaintiff has submitted no evidence to the contrary, the Court finds that the District Council not the Lorton Administrator, is the final policymaking authority in this area.

The Court can grant neither the plaintiff's nor the District of Columbia's motions for summary judgment on § 1983 liability because there remain issues of material fact as to whether there was a practice or policy at Lorton so permanent and well settled as to constitute a 'custom or usage' with the force of law." Prapotnik, 485 U.S. at 127 (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970).

Pursuant to the Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Mere allegations or denials of the moving party's pleadings are not enough to prevent issuance of summary judgment. The adverse party's response to the summary judgment motion must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Pro. 56(e). In this case, neither party has set forth facts sufficient to allow the Court to grant its motion for summary judgment.

Plaintiff has referred to Judge Lamberth's opinion in Byrd, which cites the written statement of a previous Administrator at Lorton:

> [T]he general policy of this facility is that a resident who is transferred to the Maximum Security Facility because of a disciplinary report, will not be considered for less restrictive housing for at least six months.

Byrd, supra at 5 (quoting October 28, 1991 letter from Lorton Administrator Stemson). In addition, plaintiff has submitted a declaration and attached exhibits showing that defendants repeatedly ignored his written and verbal requests to be released from administrative segregation. It may be that the "policy" announced by Administrator Stemson has been adopted by Administrator Lattimore. Plaintiff's declaration and exhibits might be evidence that this "policy" was still in effect from December, 1992 to June, 1993. Furthermore, the fact that two different Administrators adopted the same policy might tend to show that this was policy authorized by the District rather than its being a departure from District policy by subordinate officials.

But plaintiff has not submitted any evidence, sufficient as a matter of law, to show that the policy stated by Administrator Stemson in October, 1991, was in effect from December 1992 to June 1993.[8] The Court cannot conclude that plaintiff's evidence of defendants' repeated failures to hold a housing hearing in 1992-93 to determine if plaintiff met the substantive predicates for administrative segregation set forth in the LRAA constitutes a "custom or usage with the force of law." Prapotnik, 485 U.S. at 127. Because the LRAA requires such findings before prisoners can be held involuntarily, there is conflicting evidence as to whether Lattimore's actions represented official policy.

---

[8] For example, Plaintiff has not submitted evidence showing that other prisoners recently moved to the Maximum Security Facility were held in administrative segregation without findings that they were a threat to others, an escape risk, or faced a serious threat from others.

The Court also cannot grant the District of Columbia's motion for summary judgment. DC has submitted no evidence contradicting plaintiff's evidence that he was for months denied his right to be released from administrative segregation without a finding that he met the criteria for continued confinement. It has submitted no evidence showing that Administrator Stemson's October 1991 letter did not constitute official policy. Nor has it submitted evidence sufficient to show that the policy was not still in effect from December 1992 to June 1993. Discovery on these questions may well be necessary. The Court cannot decide them without further submission of evidence by the parties.

II. D. Harmless Error Analysis

Defendant DC claims that even if plaintiff's rights were violated by failing to provide him with a hearing and failing to make the determination that he was an escape risk or threat to self and others, the error was harmless.[9] That claim is not supported by the evidence. Defendants state that prison officials found defendant to be an escape risk at a custody review on March 24, 1993. In fact, at the March 24, 1993 review, plaintiff's escape history score was zero, and the

---

[9] The cases defendant cites to support its claim that this Court should use harmless error analysis all concern Court findings that an error in procedure occurred at a hearing. In this case, plaintiff is challenging the fact that no hearing was held for about seven months to determine if he could legally be held in administrative segregation. It is unclear whether harmless error analysis is appropriate where no hearing occurred at all. Plaintiffs have not raised this issue. Because the Court finds the error was not harmless, it need not consider whether the defendants' violations of plaintiff's Constitutional rights ought to be subject to harmless error analysis.

prison officials recommended that Mr. Neal be placed in medium custody.[10] Nothing in that review supports the argument that defendants would have found Mr. Neal to be an escape risk subject to continued administrative segregation in December, 1992 had a hearing been held. Defendants also rely on the July 8, 1993 housing board finding that Mr. Neal was a "threat to self and others" to prove harmless error. Defendant Roach's Motion to Dismiss, Ex. 5, p. 2. This housing board finding does not demonstrate that the failure to hold hearings from December 1992 on was harmless. The Board made its July 8, 1993 finding because Mr. Neal had been stabbed by another inmate on or about June 21, 1993 while he was in Cellblock 1 in protective custody. Defendant Roach's Motion to Dismiss, Ex. 5, p. 1-2. The June 21, 1993 incident is irrelevant to defendant's claim that the Housing Board would have concluded in December 1992 that Mr. Neal should remain in protective custody.

For the reasons set forth in part II C, plaintiff's motion for summary judgment is denied. For the reasons set forth in part II D & E, defendant's motion for summary judgment is denied.

III Pendent State Claims

Plaintiff has set forth two state causes of action under the LRAA. First, he alleges that defendants Lattimore and the District are jointly and severally liable for holding him in involuntary protective custody from December 1, 1992 to June 21, 1993 without making the appropriate findings

---

[10] Plaintiff has submitted a declaration stating that the March 24, 1993 hearing only concerned his custody status, not his placement in administrative segregation. Defendants have submitted no contradictory evidence.

required by the LRAA.[11] Second, plaintiff alleges that defendants Lattimore and the District are jointly and severally liable under LRAA § 207 for holding him in involuntary protective custody from April 30, 1992 (the date Neal was supposed to receive his first periodic housing review after his initial placement in administrative segregation) to June 21, 1993 without holding periodic housing hearings.

Neither party has adequately briefed the state law questions. It is not clear whether the LRAA even creates a private right of action. Even if the LRAA does create a private right of action, the parties have not addressed whether plaintiff must exhaust any administrative procedures before bringing a claim under the LRAA. Until the parties address these questions, the Court cannot determine whether Mr. Neal has a state law cause of action and, if so, whether this Court will exercise supplemental jurisdiction under 28 U.S.C. § 1367. Accordingly, the Court will order that the parties submit simultaneous memoranda of points and authorities on these questions within ten days.

IV Defendant Lattimore's Motion to Dismiss

Defendant Lattimore has made a motion to dismiss the § 1983 claims against him on the grounds that he is protected by qualified immunity. He also argues that plaintiff's state law claims are properly brought in state court. The Court cannot grant the motion to dismiss at this time. As explained above,

---

[11] Plaintiff specifically alleges violations of LRAA §§ 200.4, 201.7 see supra and 206.1 ("If, after a hearing, the Board determines that the resident should be placed in segregation the Board must prepare within three (3) working days of the hearing, a written statement containing the Board's decision and the factual information upon which the decision is based.")

the Court may still exercise supplemental jurisdiction over plaintiff's state law claims. Qualified immunity does not protect defendant Lattimore against those claims. Plaintiff has alleged that defendant Lattimore not only was personally aware of plaintiff's repeated requests to be released from administrative segregation, but also that he callously disregarded plaintiff's rights. The defendant certainly must explain why he ignored the LRAA and the regular attempts by the plaintiff to obtain a hearing and release form administrative segregation. Until then, the Court will deny the motion to dismiss. An appropriate order follows.

DATE: 6/12/95

/s/
Stanley Sporkin
United States District Court

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JUN 12, 1995
Clerk U.S. District Court
District of Columbia

JAMES NEAL	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 94-1528
DISTRICT OF COLUMBIA, et al.	)	(Stanley Sporkin)
	)	
	)	
Defendants.	)	

ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant District of Columbia's motion for summary judgment be **DENIED**. It is further

ORDERED that plaintiff's motion for summary judgment be **DENIED**. It is further

ORDERED that all parties submit memoranda of points and authorities within ten days of the receipt of this order on the question of whether the LRAA creates a private right of action; if so, whether plaintiff must first exhaust

administrative remedies; and if so, whether he has done so. It is further

ORDERED that defendant Lattimore's motion to dismiss plaintiff's claims against him personally under 42 U.S.C. § 1983 be **DENIED**. It is further

ORDERED that defendant Lattimore's motion to dismiss plaintiff's supplemental claims under the LRAA be **DENIED**.

DATE: 6/12/95

/s/ Stanley Sporkin
United States District Court

APPENDIX I

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-7187 **September Term, 1997**
94cv01528

UNITED STATES COURT OF
APPEALS FOR DISTRICT OF
COLUMBIA CIRCUIT FILED
FEB -9 1998
CLERK

James H. Neal,

Appellant

v.

District of Columbia and John Lattimore,
Appellees

BEFORE: Wald, Henderson and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed January 15, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Deputy Clerk

APPENDIX J

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-7187 **September Term, 1997**
94cv01528

UNITED STATES COURT OF
APPEALS FOR DISTRICT OF
COLUMBIA CIRCUIT FILED
FEB -9 1998
CLERK

James H. Neal,

Appellant

v.

District of Columbia and John Lattimore,
Appellees

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's Suggestion for Rehearing In Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Deputy Clerk

APPENDIX K

Constitutional provisions

U.S. Const. amend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Regulations

D.C. Mun. Regs. tit. 28 (1987)
(Lorton Regulations Approval Act ("LRAA")(1982))

D.C. Mun. Regs. tit. 28 § 500.1 (1987)

The provisions of §§500 through 519 of this chapter shall govern disciplinary actions taken when a resident of a District correctional facility is charged with a violation of the Code of Offenses set forth in §§502 through 504 of this chapter. (LRAA Ch. 1 § 100.1 (1982))

D.C. Mun. Regs. tit. 28 § 500.2 (1987)

A resident charged with a violation of the Code of Offenses who is found to pose a clear and present danger to others, or who is a definite escape risk, may be placed in administrative segregation prior to a hearing pursuant to the provisions of §531 of this chapter. (LRAA Ch. 1 § 100.2 (1982))

D.C. Mun. Regs. tit. 28 § 500.3 (1987)

A resident charged with a violation of the Code of Offenses who is found to be in danger from a clear and present threat to that resident's safety may be placed in involuntary protective custody pursuant to the provisions of §521 of this chapter. (LRAA Ch. 1 § 100.3 (1982))

D.C. Mun. Regs. tit. 28 § 500.4 (1987)

A resident who has been charged with a violation of the Code of Offenses may request placement in voluntary protective custody pursuant to the provisions of §521 of this chapter. (LRAA Ch. 1 § 100.4 (1982))

D.C. Mun. Regs. tit. 28 § 500.5 (1987)

If an alleged violation of the Code of Offenses is referred for prosecution, both adjustment action and housing action may be taken against the resident charged with the violation. (LRAA Ch. 1 § 100.5 (1982))

D.C. Mun. Regs. tit. 28 § 500.6 (1987)

If both adjustment and housing actions are initiated against a resident for the same alleged violation of the Code of Offenses, the adjustment and housing hearings required by this chapter shall be consolidated to allow the resident to be represented by one (1) counsel at both hearings. (LRAA Ch. 1 § 100.6 (1982))

D.C. Mun. Regs. tit. 28 § 500.7 (1987)

Notwithstanding the requirements of this chapter, a resident who has been found to have committed a Class III (minor) offense by a Department employee may be subject to any of the following actions without a hearing or written record:
(a) Reprimand and warning;
(b) Restitution, where appropriate; and
(c) Confiscation, where appropriate.
(LRAA Ch. 1 § 100.7 (1982))

D.C. Mun. Regs. tit. 28 § 500.8 (1987)

Whenever an offense is charged, the accused shall be accorded all of the procedural safeguards provided in this chapter. (LRAA Ch. 1 § 100.8 (1982))

D.C. Mun. Regs. tit. 28 § 505.2 (1987)

A resident who is found guilty of a violation of any Class II (major) offense, as set forth in §503, shall be subject to the imposition of any of the following penalties and to any penalty set forth in §505.3 for Class III (minor) offenses:
(a) Forfeiture of all or part of earned good time;
(b) Change in custody status or housing assignment;
(c) Assignment to adjustment segregation, as defined in §505.5, for a period not to exceed
fourteen (14) days;
(d) Loss of pay, reduction in grade, or change of work assignment; Provided, that this punishment shall only be imposed when the offense was committed in the performance of a work assignment;
(e) Transfer to Maximum Security status; or
(f) Extra duty assignment to be performed in the resident's off-duty time from the resident's regular work assignment. (LRAA Ch. 1 § 105.2 (1982))

D.C. Mun. Regs. tit. 28 § 520.2 (1987)

A resident who has been found to pose a clear and present danger to the safety of others shall be subject to placement in administrative segregation. (LRAA Ch. 2 § 200.2 (1982))

D.C. Mun. Regs. tit. 28 § 520.3 (1987)

A resident who is found to be a definite escape risk shall be subject to administrative segregation. (LRAA Ch. 2 § 200.3 (1982))

D.C. Mun. Regs. tit. 28 § 520.4 (1987)

A resident who is found to be in danger from a clear and present threat to the resident's safety shall be subject to

placement in involuntary protective custody. (LRAA Ch. 2 § 200.4 (1982))

D.C. Mun. Regs. tit. 28 § 521.2 (1987)

Administrative segregation may be used for the following purposes:
(a) To hold a resident prior to a housing hearing or adjustment hearing; or
(b) To hold a resident in voluntary or involuntary protective custody. (LRAA Ch. 2 § 201.1 (1982))

D.C. Mun. Regs. tit. 28 § 521.3 (1987)

Administrative segregation shall also include restrictive confinement of a prisoner in any cell of the maximum security facility, or in a control cell of the central facility, or in a control cell at Youth Center II, or in the protective custody unit of Youth Center I, or in the adjustment unit of Youth Center I. (LRAA Ch. 2 § 201.8 (1982))

D.C. Mun. Regs. tit. 28 § 521.4 (1987)

Before a resident is placed in any cell of the maximum security facility, or in a control cell of the central facility, or a control center at Youth Center II, there shall be a finding made that:
(a) There is a clear and present threat to the safety of the resident;
(b) The resident poses a clear and present threat to the safety of others; or
(c) The resident poses a definite escape risk.
(LRAA Ch. 2 § 201.9 (1982))

D.C. Mun. Regs. tit. 28 § 521.10 (1987)

Involuntary protective custody shall be defined as confinement of a resident in administrative segregation against the resident's will. (LRAA Ch. 2 § 201.5 (1982))

D.C. Mun. Regs. tit. 28 § 521.11 (1987)

Voluntary protective custody shall be defined as the placement of a resident in administrative segregation at the request of the resident. (LRAA Ch. 2 § 201.6 (1982))

D.C. Mun. Regs. tit. 28 § 521.12 (1987)

If a resident in voluntary protective custody provides the Department with a written statement that the resident no longer wishes to remain in protective custody, the resident shall be released at once from protective custody; Provided, that a resident who requests release may be placed in involuntary protective custody under the provisions of this chapter for involuntary placement in protective custody. (LRAA Ch. 2 § 201.7 (1982))

D.C. Mun. Regs. tit. 28 § 526.1 (1987)

If, after a hearing, the Board determines that the resident should be placed in segregation, the Board shall prepare, within three (3) working days of the hearing, a written statement containing the Board's decision and the factual information upon which the decision is based. (LRAA Ch. 2 § 206.1 (1982))

D.C. Mun. Regs. tit. 28 § 527.1 (1987)

If a resident is placed in administrative segregation, that placement shall be reviewed at hearings held at thirty (30) day intervals. (LRAA Ch. 2 § 207.1 (1982))

D.C. Mun. Regs. tit. 28 § 527.2 (1987)

At each thirty-day review, it shall be the responsibility of the Board to determine whether the resident's return to the general population at the time of that particular review still poses an escape risk or security risk to the resident or others. (LRAA Ch. 2 § 207.2 (1982))

D.C. Mun. Regs. tit. 28 § 527.3 (1987)

In particular under §527.2, the Board members shall determine whether other residents from whom the resident is to be separated are presently in the general population. (LRAA Ch. 2 § 207.2 (1982))

D.C. Mun. Regs. tit. 28 § 527.4 (1987)

The resident shall have a right to be present, with a representative, at every third (3rd) review hearing (every ninety (90) days). The resident may present evidence at that time. (LRAA Ch. 2 § 207.3 (1982))

D.C. Mun. Regs. tit. 28 § 527.5 (1987)

At each thirty-day review hearing, the resident or the resident's counsel or substitute counsel may present in writing any new evidence for the consideration of the Board. (LRAA Ch. 2 § 207.4 (1982))

D.C. Mun. Regs. tit. 28 § 527.6 (1987)

If after a thirty-day review hearing the Board determines that the resident should remain in segregation, it shall prepare a written statement of the reasons for its determination. (LRAA Ch. 2 § 207.5 (1982))

D.C. Mun. Regs. tit. 28 § 527.7 (1987)

A copy of this written statement shall be furnished to the resident within one (1) week of the determination. (LRAA Ch. 2 § 207.6 (1982))

D.C. Mun. Regs. tit. 28 § 527.8 (1987)

If the Board determines that there is no longer an escape risk, or a security risk to the resident or others, the resident shall be released from segregation. (LRAA Ch. 2 § 207.7 (1982))

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

James H. Neal, #184-107
P.O. Box 5200
Lorton, Virginia 22199-0902
(Enter above, full name, prison number and address)

vs.

CIVIL ACTION NO._____
(To be supplied by the Clerk of the District Court)

District of Columbia
District Building
350 Pennsylvania Avenue, NW
Washington, DC 20004

David Roach
Warden
Maximum Security Facility
P.O. Box 5200
Lorton, Virginia 22199-0902
(Enter above, full name and address, of defendant(s) in this action)

COMPLAINT FOR VIOLATION OF CIVIL RIGHTS

Instructions for filing a Complaint by a Prisoner
Under the Civil Rights Act, 42 U.S.C. Section 1983

This packet contains one copy of a complaint form and one copy of a forma pauperis petition. To start an action, you must file an original and one copy for the Court and one copy

for each defendant you name. For example, if you name two defendants, you must file the original and three copies of the complaint. You should also keep an additional copy of the complaint for your own records. All copies of the complaint must be identical to the original.

The Clerk will not file your complaint if these instructions and these forms are not used.

Your complaint must be clearly handwritten or typewritten. You, the plaintiff, must sign and declare under penalty of perjury that the facts are correct. If you need additional space to answer a question, you may use another blank page.

Your complaint can be brought in this Court only if one or more of the named defendants is located within the District of Columbia. Further, you must file a separate complaint for each claim that you have unless they are all related to the same incident or problem.

In order for this complaint to be filed, it must be accompanied by the filing fee of $120.00. In addition, you must serve a copy of the complaint on each of the defendants in any of the ways provided for in Rule 4, Federal Rules of Civil Procedure.

If you are unable to pay the filing fee and service costs for this action, you may petition the Court to proceed in forma pauperis. One blank petition for this purpose is included in this packet. This petition should be filed with your complaint.

The law requires that you state only facts in your complaint. COMPLAINTS CONTAINING LEGAL ARGUMENTS OR CITATIONS WILL NOT BE FILED.

When these forms are completed, mail the original and the required copies to the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue, N.W. , Room 1825, Washington, D.C. 20001.

I. PREVIOUS LAWSUITS

A. Have you begun other lawsuits in state or federal Court dealing with the same or similar facts involved in this action? Yes (*XXX*) No ( )

B. Have you begun other lawsuits in state or federal court relating to your imprisonment? Yes ( ) No (*XXX*)

C. If your answer to A or B is Yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit

Plaintiffs: *James H. Neal*

Defendants: *District of Columbia, et al.*

2. Court (if federal court, name the district; if state court, name the county): *U. S. District Court for the District of Columbia.*

3. Docket number: *93-2443*

4. Name the judge to whom case was assigned: *J. Sporkin (SS)*

5. Disposition (for example: was the case dismissed? Was it appealed? Is it still pending?): *It's still pending*

6. Approximate date of filing lawsuit? *November 1, 1993*

7. Approximate date of disposition: *Still pending*

II. PLACE OF PRESENT CONFINEMENT: *Maximum Security Facility, Lorton, Virginia*

A. Is there a prisoner grievance procedure in this institution? Yes (*XXX*) No ( )

If your answer is Yes, go to Question II B. If your answer is No skip Question II B, C and D and go to Question II E.

B. Did you present the facts relating to your complaint in the prisoner grievance procedure? Yes (*XXX*) No ( )

C. If your answer is Yes to Question II B

1. To whom and when did you complain? *The Administrator*

2. Did you complain in writing? (Furnish copy of the complaint you made, if you have one.) *Yes*

3. What, if any response, did you receive? (Furnish copy of response if in writing.) *No response received - see copy of complaint*

4. What happened as a result of your complaint? *Nothing*

D. If your answer is No to Question II B, explain why not. *See enclosed complaint*

E. If there is no prison grievance procedure in the institution, did you complaint to prison authorities? Yes (*XXX*) No ( )

F. If your answer is Yes to Question II E

1. To whom and when did you complain? *To the Administrator on April 11, 1993.*

2. Did you complain in writing? (Furnish copy of the complaint you made, if you have one.) *Yes*

3. What, if any response, did you receive? (Furnish copy of response if in writing.) *Never received a response.*

4. What happened as a result of your complaint? *Nothing*

III. PARTIES

In item A below, place your name and prison number in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.

A. Name of plaintiff: *James H. Neal # 184-107*
Address: *P.O. Box 5200, Lorton, Virginia 22199*

In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and address in the third blank.

B. Defendant: *David D. Roach*
Official position: *Warden*
Address: *P.O. Box 5200, Lorton, Virginia 22199-0902*

Defendant: *District of Columbia District Building*
Official position:
Address: *1350 Pennsylvania Avenue, NW*
Washington, D.C. 20004

You may list any additional defendants on a blank sheet of paper.

IV. STATEMENT OF CLAIM

State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statues. If you intent to allege a number of related claims, number and set forth each claim in a separate paragraph. Attach extra sheet, if necessary.

From approximately April 3, 1992 to June 21, 1993 I was housed in CB-1 at Lorton's Maximum Security Facility. At no time did I receive a housing review held at 30 day intervals, nor did I receive a review hearing every 90 days as provided by the "Lorton Regulation Approval Act of 1982".

V. RELIEF

State briefly exactly what you want the Court to do for you. Make no legal arguments. Cite no cases or statutes.

1. Compensatory damages from defendants in an amount not less than $100,000 each.
2. Punitive damages from defendants in an amount not less than $100,000 each.
3. Appointment of counsel.
4. Any other just and appropriate relief - trial by jury.

Signed this 22 day of June, 1994.

/s/ James H. Neal
(Signature of plaintiff)

I declare under penalty of perjury that the foregoing is true and correct.

6/22/94 /s/ *James H. Neal*
(date) (Signature of plaintiff)

/s/ *M. L. Williams*
My Commission Expires 9/30/94

APPENDIX M

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

James H. Neal,	:	
Plaintiff,	:	
vs.	:	Civil Action No. 94-1528 Judge Stanley Sporkin
District of Columbia, et. al.	:	
Defendants.	:	

AMENDED COMPLAINT

1. Plaintiff was originally placed on voluntary protective custody status and housed in cellblock one (1) on March 31, 1992.

2. In compliance with the Lorton Regulations Approval Act of 1982, Section 207.2 the plaintiff should have been reviewed at thirty-day hearings which he did not received.

3. Further in compliance with the Lorton Regulations Approval Act of 1982, Section 207.3 plaintiff had a right to a review hearing every ninety (90) days which he did not receive.

4. On several occasions the plaintiff has filed request to be released from protective custody status (see attached copies).

5. The Lorton Regulations Approval Act of 1982, Section 200.4 creates a liberty interest not to be confined in P/C without either the consent of the resident or a finding that the resident is in "danger from a clear and present threat of the resident's safety."

6. Plaintiff was retained on P/C despite having served notice of withdrawal of his consent, and without any finding or hearing as whether the plaintiff faced danger warranting involuntary P/C.

7. Plaintiff claim is a denial of Fifth Amendment procedural due process (no procedure at all having been used to determine the validity of his continued detention in P/C) for which the plaintiff seeks damages for loss of liberty, and mental and emotional distress.

RELIEF

WHEREFORE Plaintiff seeks the following damages for loss of liberty, and mental and emotional distress:

1. Compensatory damages from defendants in an amount not less than One Hundred Thousand Dollars ($100,000.00) each; and

2. Punitive damages from the defendants in an amount not less than One Hundred Thosand Dollars ($100,000.00) each; and

3. Appointment of Counsel; and

4. Any other just and appropriate relief deemed by the Court - trial by jury.

Respectfully submitted,

/s/ James H. Neal
DCDC #184-107
Maximum Security Facility
P.O. Box 5200
Lorton, VA 22199

APPENDIX N

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES H. NEAL,	)	
Plaintiff,	)	
v.	)	Civ. A. No.
	)	94-1528-SS
DISTRICT OF COLUMBIA, *et al.*,	)	
Defendants.	)	

STATEMENT OF MATERIAL FACTS NOT SUBJECT TO GENUINE DISPUTE

1. Plaintiff James H. Neal is a District of Columbia prisoner. He is presently housed in the general population cell block, Cell Block Seven, at the Maximum Security Facility at Lorton, Virginia. Plaintiff's Exhibit A at ¶ 1.

2. Around March 1, 1992, Mr. Neal was transferred from the Federal Bureau of Prisons (Leavenworth) to the District of Columbia Department of Corrections, Occoquan Facility, Lorton, Virginia. Department officials informed Mr. Neal that, due to the length of his sentence, he would have to be housed at the Maximum Security Facility. Mr. Neal acknowledged their view and did not oppose being housed at the Maximum Security Facility. Defendant's Exhibit #3, at 4.

3. Around March 22, 1992, Mr. Neal arrived at the Maximum Security Facility. On March 31, 1992, Mr. Neal received his initial classification hearing. Only one member of the Classification Board, Case Manager Jefferey Durante, was present. Mr. Neal requested voluntary protective custody status, because he wanted to become acquainted with the conditions and routine at the Maximum Security Facility before being exposed to the general population there. Mr. Neal did not request protective custody because of any specific threat to his safety. Mr. Neal did not know of, nor did he believe there was, any such threat. Plaintiff's Exhibit A. The housing committee placed Mr. Neal in Cell Block #1 (CB#1) because of his request for protective custody and because

> [i]t is the policy of the Maximum Security Facility to house those residents in Cellblock #1 requiring protective custody and who have been determined by the Housing Board or Classification Committee as possessing a non-violent institutional case history.

Division Operations Procedure 4000.1, Cellblock One Operations, cited in Motion of Defendant, David Roach, to Dismiss Plaintiff's Complaint, or in the Alternative, for Summary Judgment (defendant Roach's Motion), at 6, fn. 2.

4. During the Classification Board hearing on March 31, 1992, Mr. Neal signed a Notice of Housing Hearing scheduling a rehearing date at April 30, 1992. Defendant's Exhibit #3, at 2.

5. At the Classification Board hearing on March 31, 1992, Mr. Neal requested a copy of the Classification Board memorandum recording the Classification Board hearing, as well as a copy of the Notice of Housing Hearing. Case

Manager Durante stated that Mr. Neal would receive copies of these documents. Mr. Neal received the memorandum about four to five days after the hearing from a detail man who received the memorandum from the Officer in Charge (OIC). The memorandum set Mr. Neal's rehearing date for April 30, 1992. Defendant's Exhibit #3, at 1. Mr. Neal never received a copy of the Notice. Plaintiff's Exhibit A at ¶ 5.

6. Inmates at CB#1 are confined to their cells for long periods, and are allowed only limited time for indoor activity out of their cells, and even less time out of doors. Outdoor activity is limited to a small, enclosed concrete courtyard. Inmates are not allowed to visit the law library or to engage in gainful employment of any kind. Inmates have access to the infirmary only on recommendation of the doctor conducting rounds in the cellblock. Plaintiff's Exhibit A at ¶ 6.

7. Within one month of being housed in CB#1, Mr. Neal wished to leave due to the restrictive conditions of confinement in CB#1. Mr. Neal no longer desired protective custody and wanted to be housed in the general population of the Maximum Security Facility. Plaintiff's Exhibit A at ¶ 7.

8. Residents in the general population are allowed greater amounts of time out of their cells for indoor and outdoor activities. The space outdoors includes a large courtyard, many times larger than the courtyard used by CB#1 prisoners, and a grass field. Upon request, passes are freely granted for access to the law library, the post office, the gymnasium, and sick call at the infirmary. There is opportunity for gainful employment, such as work in the law library, which Mr. Neal now does. Plaintiff's Exhibit at ¶ 8.

9. Mr. Neal did not receive a review of his housing status on April 30, 1992, as had been scheduled. According to the Lorton Regulations Approval Act of 1982 (LRAA), the

housing status of inmates in administrative segregation must be reviewed at thirty day intervals. However, Mr. Neal did not receive a review of his housing status by the end of May 1992. Defendant's Exhibit #7, at 21 (LRAA § 207.1, at 29); Plaintiff's Exhibit A at ¶ 9.

10. According to the LRAA, inmates in administrative segregation have the right to attend a review hearing every ninety days. However, Mr. Neal did not receive a review of his housing status by the end of June 1992. Defendant's Exhibit #7, at 22 (LRAA § 207.3, at 30); Plaintiff's Exhibit A at ¶ 10.

11. Mr. Neal did not receive any review of his housing status by the end of July, August, or September 1992. Plaintiff's Exhibit A at ¶ 11.

12. On October 5, 1992, Mr. Neal submitted a Resident Request Slip to the Housing Board, requesting a 30 or 90 day review of his housing. Plaintiff's Exhibit 1. Mr. Neal submitted the Request Slip by requesting and obtaining copies of the form from a guard, filling out the Request Slip using carbon in order to retain a copy for his records, and then placing the Request Slip in the intra-facility and general mail-box, which is connected to the guards' side of the grille in CB#1. In submitting the Request Slip, Mr. Neal wanted the Housing Board to review his housing status so that Mr. Neal could request placement in the general population. Plaintiff's Exhibit A at ¶ 12.

13. The Housing Board did not respond to Mr. Neal's request of October 5, 1992. The Housing Board did not review Mr. Neal's housing status by the end of October, 1992. Plaintiff's Exhibit A at ¶ 13.

14. On November 7, 1992, Mr. Neal submitted a second Resident Request Slip to the Housing Board, requesting a review of his housing status. Plaintiff's Exhibit 2.

15. The Housing Board did not respond to Mr. Neal's request of November 7, 1992. The Housing Board did not review Mr. Neal's housing status by the end of November, 1992. Plaintiff's Exhibit A at ¶ 15.

16. On December 1, 1992, Mr. Neal submitted a third Resident Request Slip to the Housing Board, specifically asking for "placement in general population." Plaintiff's Exhibit 3.

17. The Housing Board did not respond to Mr. Neal's request of December 1, 1992. The Housing Board did not review Mr. Neal's housing status by the end of December, 1992. Plaintiff's Exhibit A at ¶ 17.

18. On January 5, 1993, Mr. Neal submitted a fourth Resident Request Slip to the Housing Board, requesting to be "released from segregation." Plaintiff's Exhibit 4.

19. The Housing Board did not respond to Mr. Neal's request of January 5, 1993. The Housing Board did not review Mr. Neal's housing status by the end of January, 1993. Plaintiff's Exhibit A at ¶ 19.

20. On February 6, 1993, Mr. Neal submitted a fifth Resident Request Slip to the Housing Board, requesting a housing hearing and a change of status from protective custody, so that he could be "released from segregation and placed in the general population." Plaintiff's Exhibit 5.

21. The Housing Board did not respond to Mr. Neal's request of February 6, 1993. The Housing Board did not

review Mr. Neal's housing status by the end of February, 1993. Plaintiff's Exhibit A at ¶ 21.

22. On March 24, 1993, the Classification Board reviewed Mr. Neal's custody level. The Classification Board found that Mr. Neal should remain at the Maximum Security Facility. The Classification Board did not address, and made no determination as to, Mr. Neal's entitlement to release from protective custody. Defendants' Exhibit #4, at 1-2.

23. On March 24, 1993, during the outside recreation period, Mr. Neal's Classification and Parole Officer, Ms. Hayes, presented Mr. Neal with a Protective Custody Request/Waiver Form. Mr. Neal was suspicious of Ms. Hayes' presentation of the form in the absence of a housing hearing, and refused to sign the form until he had communicated with his attorney and until a housing hearing was held. Mr. Neal communicated his objection to Ms. Hayes, and noted his objection on the Request/Waiver Form. Defendant's Exhibit #4, at 3; Plaintiff's Exhibit A at ¶ 23.

24. On March 29, 1993, Mr. Neal submitted a Resident Request Slip to Administrator John W. Lattimore, stating

> I've submitted several requests to the housing board, spoke with my C&P about being reviewed so I can be placed in general population and I've yet to get any results so I turn to you. I've been in administrati[ve] segregation P/C [protective custody] for a year now and I haven't had any 30 or 90 day reviews as provided by the LRAA of 1982 (None!). I simply want to be removed from CB-1 and placed in CB-7 general population. In order for this to occur I have to have a housing [review] so I can sign off of P/C

> (which I've been trying to do for sometime now) and be properly housed. Would you please instruct the board to give me a housing hearing as soon as possible.

Plaintiff's Exhibit 6.

25. Administrator Lattimore did not respond to Mr. Neal's request. The Housing Board did not review Mr. Neal's housing status. Plaintiff's Exhibit A at ¶ 25.

26. On March 30, 1993, on his way to sick-call, Mr. Neal encountered Administrator Lattimore, and told him he wanted to be placed in the general population. Administrator Lattimore told Mr. Neal to submit a written request. Mr. Neal said that he already had submitted a written request. Plaintiff's Exhibit A at ¶ 26.

27. On April 11, 1993, Mr. Neal submitted an Inmate Grievance Petition (IGP) to Administrator Lattimore stating that he had been housed in CB#1 since April, 1992, without any 30 or 90 day review, as provided by the LRAA, and that he had submitted several written requests for a review, and that none of his requests had been answered. Mr. Neal placed the IGP in the cellblock institutional mailbox designated for that purpose. Plaintiff's Exhibit A at ¶ 27; Plaintiff's Exhibit 7.

28. Mr. Neal did not receive a review of his housing status by the end of April, May, or June 1993. Mr. Neal received no response to his April 11, 1993 IGP in the months of April, May, or June 1993. Plaintiff's Exhibit A at ¶ 28.

29. On June 21, 1993, Mr. Neal was taken to D.C. General Hospital, due to an injury. When he returned to the Maximum Security Facility on June 29 or June 30, 1993, Mr. Neal was first housed at Cell Block Six until July 8, 1993. Mr. Neal

requested protective custody at his initial Housing Board hearing on July 8, 1993. On October 12, 1993, the Housing Board, with Mr. Neal's consent, determined that Mr. Neal could be transferred to the general population. Soon thereafter Mr. Neal was housed in the general population in CB#7. Defendant's Exhibit #5 - 6; Defendant's Exhibit #7, at 1-3.

30. The conditions in administrative segregation in CB#1 and in the general population were dramatically different during the relevant time period. Conditions in CB#1 were much more restrictive than in the general population. Plaintiff's Exhibit A at ¶ 30.

31. In CB#1, inmates were confined to their cells for about 15 hours in a 24 hour period on Mondays, Wednesdays, and Fridays. During the time that inmates were released from their cells they were allowed to spend only 2 hours out of doors, in a small concrete courtyard. Inmates were required to spend the remaining time inside the cellblock. On the other days of the week, conditions of confinement in CB#1 were even more restrictive, due to visiting hours, during which prisoners who did not receive visits were confined to their cells. On Tuesdays and Thursdays, inmates without visitors were confined to their cells for about 17-1/2 hours in a 24 hour period. On Saturdays inmates without visitors were confined to their cells for about 18 hours in a 24 hour period. During the time that inmates were released from their cells they were allowed to spend only 1 hour out of doors. On Sundays, inmates without visitors were confined to their cells for about 19 hours in a 24 hour period and were not allowed any time out of doors. On Tuesdays, Thursdays, Saturdays, and Sundays, prisoners with visitors were allowed to spend up to one hour with their visitors. Visits occurred in the cellblock activity room, which also served as a dining hall, and classroom. Plaintiff's Exhibit A at ¶ 31.

32. In the general population, prisoners were confined to cells for at most 9-1/2 hours in a 24 hour period. During time outside their cells prisoners were allowed to spend about 2 hours out of doors and about 4-1/2 in paid work activity, except on Saturdays and Sundays, when prisoners did not work. On Fridays and Saturdays prisoners were confined to their cells for only about 6-1/2 hours in a 24 hour period. Plaintiff's Exhibit A at ¶ 32.

33. In CB#1, inmates generally were not allowed to leave the cellblock unless they had a scheduled legal or medical visit. Inmates were handcuffed and shackled upon leaving the cellblock. Medical cellblock visits occurred approximately twice a week. Inmates were not allowed to visit the law library, and had only very limited access to legal research materials. Plaintiff's Exhibit A at ¶ 33.

34. In constrast, prisoners in the general population, upon obtaining a pass which normally is freely granted, could visit the law library, the mail room, and the gymnasium, and walk to sick call--all without handcuffs or shackles. Plaintiff's Exhibit A at ¶ 34.

35. During visiting hours at CB#1, inmates were allowed to receive visitors for up to one hour per visiting day. Inmates were not allowed to go to meet visitors; rather, visitors were brought to the cellblock. Plaintiff's Exhibit A at ¶ 35.

36. Although general population prisoners had a visiting schedule similar to that of CB#1, prisoners were not confined to their cells during visiting hours, as they were in CB#1. General population prisoners were notified when they had visitors and were then allowed to walk to the visiting room. Plaintiff's Exhibit A at ¶ 36.

37. Mr. Neal did not receive any 30-day or 90-day review of his protective custody during the entire period that he was housed at CB#1, from around April 3, 1992 to June 21, 1993. Mr. Neal did not receive any responses to his requests for release from protective custody or his requests for a hearing. During most of Mr. Neal's confinement in protective custody, John W. Lattimore was Administrator of the Maximum Security Facility. His custom and practice, like that of his predecessor, Douglas Stempson, was not to afford prisoners in administrative segregation frequent hearings necessary to determine whether they faced a present threat to their safety. Plaintiff's Exhibits 1-9; Plaintiff's Exhibit A; *Byrd v. District of Columbia, et al.*, Civil Action No. 92-0608 (RCL) (D.D.C. Sept. 23, 1993)

38. As a result of his lengthy, restrictive confinement in protective custody, as well as the total lack of response to his requests, Mr. Neal suffered loss of liberty, as well as emotional and mental distress. Plaintiff's Exhibit A.

Respectfully submitted,

Daniel M. Schember
D.C. Bar #237180
Gaffney & Schember, P.C.
1666 Connecticut Avenue, N.W.
Suite 225
Washington, D.C. 20009
202/328-2244

Counsel for Plaintiff

FILED
JUL 30 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1816

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

JAMES H. NEAL,
Petitioner,
v.
DISTRICT OF COLUMBIA, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

JOHN M. FERREN
Corporation Counsel

CHARLES L. REISCHEL
Deputy Corporation Counsel
Appellate Division

MARY L. WILSON
Assistant Corporation Counsel
Counsel of Record

Office of the Corporation Counsel
One Judiciary Square
441 4th Street, N.W.
Washington, D.C. 20001-2714
Tel: (202) 727-6252 ext. 3306

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2
A. Introduction 2
B. Background. 3
C. The Facts. 4
D. The Decisions Below. 6

REASONS FOR DENYING THE WRIT 7

I. THE FACTS PRESENTED IN THIS CASE DO NOT JUSTIFY REVIEW OF THE UNDERLYING LEGAL ISSUE. 8

II. BECAUSE OF THE UNIQUE CIRCUMSTANCES OF DISTRICT OF COLUMBIA PRISONERS, A DECISION BY THIS COURT HERE WOULD NOT NECESSARILY RESOLVE THE LEGAL ISSUE IN OTHER JURISDICTIONS. 13

TABLE OF AUTHORITIES

CASES

Abdullah v. Roach, 668 A.2d 801 (D.C. 1995) 3, 15

Bagguley v. Bush, 953 F.2d 660 (D.C.Cir. 1991), *cert. denied* 503 U.S. 995 (1992) 14

Barden v. Keohane, 921 F.2d 476

(3d Cir. 1990) 6, 13
Brooks v. DiFasi, 112 F.3d 46
(2d Cir. 1997) 10
Brown v. Plaut, 131 F.3d 163
(D.C.Cir. 1997), *cert. denied*,
66 U.S.L.W. 3799 (June 22, 1998) . . . . . passim
Carey v. Piphus, 435 U.S. 247 (1978) 12
Clarke v. Stadler, 121 F.3d 222, 226
(5th Cir. 1997), *rehearing en banc*
granted, 133 F.3d 940 (1997) 15
Crosby-Bey v. District of Columbia,
786 F.2d 1182 (D.C.Cir. 1986) 3
Curry-Bey v. Jackson, 422 F.Supp. 926
(D.D.C. 1976) 6
Edwards v. Balisok, 520 U.S. 641 (1997) 15
Griffin v. Vaughn, 112 F.3d 703
(3d Cir. 1997) 9
Heck v. Humphrey, 512 U.S. 477 (1994) 15
Hewitt v. Helms, 459 U.S. 460
(1989) 8, 10
Hudson v. Hardy, 424 F.2d 854
(D.C.Cir. 1970) 15
Keenan v. Hall, 83 F.3d 1083
(9th Cir. 1996) 9
Luken v. Scott, 71 F.3d 192
(5th Cir. 1995), *cert. denied*,
517 U.S. 1196 (1996) 10
Mackey v. Dyke, 111 F.3d 460 (6th Cir.),
cert. denied, 66 U.S.L.W. 3257
(1997) 10
Meachum v. Fano, 427 U.S. 215 (1976) 10
Montanye v. Haymes, 427 U.S. 236 (1976) 11
Olim v. Wakinekona, 461 U.S. 238 (1983) 11
Preiser v. Rodriguez, 411 U.S. 475 (1973) 15
Sandin v. Conner, 515 U.S. 472 (1995) . . . . . passim
Stone-Bey v. Barnes, 120 F.3d 718 (7th Cir. 1997) . . 15

United States v. Taylor, 485 F.2d 1077
(D.C.Cir. 1973) 5
Vaughn v. United States, 579 A.2d 170
(D.C. 1990) 5
Verrett v. Stempson, 623 A.2d 120
vacated as moot, 643 A.2d 902 (D.C. 1993) . . . 4
Wagner v. Hanks, 128 F.3d 1173
(7th Cir. 1997) 9, 10
Walton v. District of Columbia,
670 A.2d 1346 (D.C. 1996) 3
White v. Hyman, 647 A.2d 1175 (D.C. 1994) 4
Wright v. Coughlin, 132 F.3d 133
(2d Cir. 1998) 10

STATUTES AND REGULATIONS

D.C. Code § 24-402 (1996) 1, 5
D.C. Code § 24-425 (1996) 1, 5
D.C. Code § 24-442 (1989) 3
Lorton Regulations Approval Act of 1982,
D.C. Law 4-153; 29 D.C.Reg. 3484-3485
(Aug. 13, 1982) 1, 3, 14, 17, 20
Balanced Budget Act of 1997, Pub.L. 105-33
(Aug. 5, 1997), Title XI, National Capital
Revitalization and Self-Government Act of
1997, Subtitle C, Criminal Justice, § 11201;
D.C.Code § 24-1201 . . . . . 1, 14, 17, 20
28 DCMR Chapter 5 (1987) at
§§ 520.2-520.4, 521.2-521.4,
521.12 (1987) 3

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

97-1816

JAMES H. NEAL,
Petitioner,
v.
DISTRICT OF COLUMBIA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 131 F.3d 172, and appears in the petitioner's appendix ("App.") at 1a-8a. The D.C. Circuit's unpublished orders denying rehearing and rehearing en banc are set out at App. 30a-33a.

STATUTORY PROVISIONS

Statutory provisions cited in this brief in opposition that are not contained in the petitioner's appendix are set forth in the appendix bound with this brief. They are: D.C. Code §§ 24-402, 425 (1996); the "Lorton Regulation Approval Act of 1982," D.C. Law 4-153, 29 D.C.Reg. 3484-3485 (Aug. 13, 1982); Balanced Budget Act of 1997, Pub.-L. 105-33 (Aug. 5, 1997), Title XI, National Capital Revitalization and Self-Government Act of 1997, Subtitle C, Criminal Justice, § 11201, D.C.Code § 24-1201 (1996, 1998 Supp.).

STATEMENT OF THE CASE

A. Introduction The District of Columbia Circuit properly concluded, in a decision written by Judge Wald, that a prisoner's placement in protective custody -- where he was allowed out of his cell four to nine hours a day -- did not infringe a sufficiently significant interest to warrant protection under the Constitution, regardless of the full reach of the "atypical and significant hardship" standard of *Sandin v. Conner*, 515 U.S. 472 (1995).

Under *Sandin*, a state-created liberty interest in the prison context should be "limited to freedom from restraint which ... imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 U.S. at 484. The D.C. Circuit found in this case and the companion case of *Brown v. Plaut*, 131 F.3d 163 (D.C.Cir. 1997), *cert. denied*, 66 U.S.L.W. 3799 (June 22, 1998), that "application of *Sandin* raised difficult questions," App. 6a, because "it is not clear which prison or part of a prison" should represent the ordinary incidents of prison life as a standard for comparison. *Brown*, 131 F.3d at 169. Other Courts of Appeals have struggled with the same issue with varying results. But this case is not the vehicle for resolving the uncertainty as to the reach of the *Sandin* standard because the conditions Neal experienced in protective custody are plainly insufficient to warrant constitutional concern under any plausible reading of *Sandin*.

Further, a case involving a District of Columbia prisoner may not be the right vehicle in which to resolve the reach of *Sandin* because of the unique circumstances of District of Columbia prisoners: 1) by statute, D.C. prisoners are committed to the custody of the Attorney General who can place them in any prison nationwide, so the "ordinary incidents of prison life" for D.C. prisoners may not be the same as for other state prisoners; and 2) the District of Columbia's Lorton Correctional Complex, where Neal was incarcerated, will be closed by the year 2001 pursuant to

federal legislation, so any determination of the "ordinary incidents of prison life" there would have limited applicability even locally.

B. Background. James Neal is a District of Columbia convict serving consecutive sentences totaling 49 to 147 years imposed by the D.C. Superior Court in 1987 for multiple counts of robbery and robbery of a senior citizen, and one count of unauthorized use of a motor vehicle. See Exhibit 1 to the defendant's motion to dismiss or for summary judgment in the district court ("defendant's dispositive motion"). In this action, Neal claims an entitlement to money damages because the District of Columbia Department of Corrections kept him in involuntary protective custody (also known as administrative segregation) for about six months at the Maximum Security Facility at the District of Columbia's Lorton Correctional Complex without making a determination that he was an escape risk, a threat to others, or that he faced a threat from others, as required under local District of Columbia prison regulations applicable to Lorton.[1/]

Although the Lorton regulations are binding on the Department of Corrections to the extent they can be enforced in local habeas corpus proceedings, *Walton v. District of Columbia*, 670 A.2d 1346 (D.C. 1996); *Abdullah v. Roach*, 668 A.2d 801 (D.C. 1995), it is an open question whether they create a liberty interest protected by due process. See, *Crosby-Bey v. District of Columbia*, 786 F.2d 1182, 1183 n.2 (D.C.Cir. 1986) (assuming without deciding that Lorton regulations create a constitutionally protected liberty interest in remaining in general prison population

---

[1/] 28 DCMR Chapter 5 (1987) at §§ 520.2-520.4, 521.2-521.4, 521.12 (1987); App. 50a-52a. Pursuant to D.C. Code § 24-442 (1989) (requiring the Council of the District of Columbia to approve Department of Corrections regulations), the Council approved the regulations in the "Lorton Regulations Approval Act of 1982," D.C. Law 4-153, 29 D.C.Reg. 3484-3485 (Aug. 13, 1982) ("LRAA").

because it appeared that prisoner received all process due when transferred to administrative segregation even if he had such a liberty interest); *Brown v. Plaut*, 131 F.3d at 169 (same); *Abdullah*, 668 A.2d at 810 n. 14 (raising but not resolving constitutional issue). Nor, in the District's view, do the regulations create a private cause of action for damages based on their violation, although no court has reached this issue.[2/]

C. The Facts. The facts relevant to Neal's claim are succinctly set out in the D.C. Circuit's decision. App. 2a-4a. In a nutshell, Neal was initially placed in protective custody at the Maximum Security Facility at Lorton with his consent. But, after he requested that he be moved to the general population at Maximum, the District kept him in segregated confinement for another six months, without holding a hearing on his request in accordance with the local prison regulations and without making an explicit determination that he was a safety or security risk. During this period:

> [Neal] was allowed to leave his cell for nine hours a day three days a week, for six and a half hours (or longer if he had a visitor) for two days a week, and for five and six hours respectively on the remaining two days. He was allowed a total of eight hours a week outdoors, in a small courtyard. He did not have easy access to the gym, mailroom, law library, or medical unit (although other arrangements were made for provision of these services), and he could not work at a prison job.

[2/] *Verrett v. Stempson*, 623 A.2d 120 (D.C. 1993), cited by petitioner at 9 n.6, was vacated as moot, *Verrett v. Stempson*, 643 A.2d 902 (D.C. 1993) and has no precedential value. *White v. Hyman*, 647 A.2d 1175, 1181 n.9 (D.C. 1994).

App. 7a.

It is relevant to *Sandin's* "atypical and significant hardship" standard that Neal has been in several different prison settings during his incarceration. The Lorton Correctional Complex contains many different prison facilities with different levels of security. In 1987, Neal was placed at the Modular Facility at Lorton. He was then transferred to serve his sentences at the federal prison in Leavenworth, Kansas. He was transferred back to Lorton in 1992, where he was initially placed at the Occoquan Facility. Exhibits 2-3 to defendant's dispositive motion; Declaration of James Neal (attached as exhibit to plaintiff's motion for summary judgment in the district court) at 1. Neal was then transferred to the Maximum Security Facility at Lorton, and placed in administrative custody in cellblock #1 with his consent. App. 7a. Eventually, he asked to be moved to the open population at Maximum, which is where he was in fact placed after he was ultimately removed from cellblock #1. App. 4a.[3/]

As the D.C. Circuit recognized in the companion case of *Brown v. Plaut*, 131 F.3d at 169, a D.C. prisoner like Neal is committed to the custody of the Attorney General of the United States, who has the authority to designate where the prisoner shall serve his sentence, and can transfer the prisoner to Lorton, or any federal, state, or contract penal facility in the country. See, D.C. Code §§ 24-402 and 425 (1996); *United States v. Taylor*, 485 F.2d 1077 (D.C.Cir. 1973) (D.C. prisoner is in custody of Attorney General even at private halfway house operated under contract with the D.C. Department of Corrections); *Vaughn v. United States*, 579 A.2d 170, 173 (D.C. 1990) (D.C. pris-

---

[3/] While this case was pending in the lower courts, Neal was transferred to a private prison in Youngstown, Ohio, where the District of Columbia has contracted to house some of its prisoners. This transfer does not render this case moot since Neal is seeking money damages.

oner can be transferred to state as well as federal facility).[4/]

Neal contends in this case that his confinement in administrative segregation implicated a protected liberty interest because the conditions in segregation were "more restrictive" than those in the general population at Maximum *where he wished to be placed*, and where he was in fact eventually placed. Petition at 3. Neal never described the conditions he experienced at the federal facility in Leavenworth, or those at the Occoquan or Modular Facilities at Lorton, and never asserted that the conditions in protective custody in the Maximum Facility at Lorton were more restrictive than those at Leavenworth or in other prisons elsewhere in the country where the Attorney General has the discretion to transfer him.

D. The Decisions Below. After this Court's decision in *Sandin v. Conner*, the district court concluded that the conditions Neal had experienced in protective custody "represented a significant deprivation from the conditions in the general population" at the Maximum Security Facility. App. 20a. However, the district court recognized, and Neal conceded, that, absent the local prison regulations, Neal would have no basis for a § 1983 action. The district court then decided as a matter of comity that the local District of Columbia courts should decide in the first instance whether the District's prison regulations created a private right of action, and dismissed Neal's entire suit. App. 14a-16a, 20a. The district court noted its "fears" that, if it granted Neal relief, "the Federal Courts [would] be flooded with

---

[4/] The Attorney General's authority in this regard appears to be totally discretionary. See, *Barden v. Keohane*, 921 F.2d 476 (3d Cir. 1990) (Attorney General has broad discretion to choose place of federal prisoner's incarceration, including choosing a state prison); *Curry-Bey v. Jackson*, 422 F.Supp. 926, 932 (D.D.C. 1976) (Attorney General's authority to designate place of D.C. prisoner's confinement is "clear and apparently limitless").

untold numbers of prisoner damages cases alleging violations" of the D.C. prison regulations. App. 14a.

On appeal, the District of Columbia Circuit rejected the district court's reasoning, but nevertheless affirmed the dismissal. App. 2a, 5a, 10a. The D.C. Circuit recognized that a prisoner might establish a § 1983 claim for deprivation of a protected liberty interest derived from local statutes or regulations even if local law did not create a cause of action. The Court of Appeals concluded, however, that Neal had no viable claim because he had no liberty interest in remaining free of the conditions imposed on him in administrative segregation, "under any plausible reading of *Sandin*." App. 6a. The Court ruled that, even if the standard for determining whether Neal suffered an "atypical and significant" deprivation was to compare his circumstances in administrative segregation with those in the general population at the Maximum Security Facility, the deprivation was "comparable to that at issue in *Sandin*" where the deprivation was "considerably more severe" although it only lasted 30 days. App. 7a.

REASONS FOR DENYING THE WRIT

Although application of the *Sandin* "atypical and significant hardship" standard has created uncertainty in the lower federal courts, this case is not the proper vehicle to resolve that uncertainty because, under any reading of *Sandin*, there is a due process-triggering threshold that was not crossed in this case. The conditions Neal endured are simply insufficient to warrant constitutional concern under *Sandin*.

Further, a case involving a District of Columbia prisoner may not be the proper vehicle for establishing a definition of "the ordinary incidents of prison life" under *Sandin* that could be applied to state prison systems because, by statute, D.C. prisoners are committed to the custody of the Attorney General who can place them in the District's Lorton Correctional Complex or any prison na-

tionwide. Indeed, any precedent defining the ordinary incidents of prison life at Lorton would have limited applicability even locally because, under federal legislation, the Lorton Correctional Complex where Neal was incarcerated is mandated to be closed by 2001.

This case does not warrant further review by the Court.

I. THE FACTS PRESENTED IN THIS CASE DO NOT JUSTIFY REVIEW OF THE UNDERLYING LEGAL ISSUE.

This case is not the vehicle for resolving the uncertainty as to how to apply *Sandin* because the conditions Neal experienced in protective custody are plainly insufficient to warrant constitutional concern under any plausible reading of *Sandin*.

1. *Sandin* dramatically redefined the law with respect to state-created liberty interests in the prison context. Under the earlier standard used in *Hewitt v. Helms*, 459 U.S. 460 (1989), constitutionally protected liberty interests were deemed created when state statutes restricted the discretion of prison administrators to place a prisoner in segregation. Under the *Hewitt* methodology, the inquiry was "whether the State had gone beyond issuing mere procedural guidelines and had used 'language of an unmistakably mandatory character' such that the incursion on liberty would not occur 'absent specified substantive predicates.'" *Sandin*, 515 U.S. at 480, citing *Hewitt*, 459 U.S. at 471-472.

The Court abandoned this approach in *Sandin*, however, because it had produced "at least two undesirable effects." 515 U.S. at 482 and n. 5 First, it created disincentives for states to codify prison management procedures in the interest of uniform treatment and in the interest of instructing prison employees how to handle their duties. Second, the *Hewitt* approach "led to the involvement of

federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." *Id.* at 482. Accordingly, the Court ruled that a state's statutory system pertaining to an inmate's discipline and segregation will create a liberty interest worthy of due process protection only if it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Id. at 484.

2. This standard has, concededly, created unanticipated problems. The lower federal courts are struggling to define "the ordinary incidents of prison life." The D.C. Circuit did not resolve the issue in this case or the companion *Brown* case but observed that "[a]t various points in *Sandin*, the Court compared the prisoner's conditions in disciplinary segregation in Hawaii's Halawa Correctional Facility to 'administrative segregation and protective custody' in that prison, to the 'general population' of that prison, and to an undefined 'range of confinement to be normally expected for one serving an indeterminate term of 30 years to life.'" *Brown*, 131 F.3d at 169, citing *Sandin*, 515 U.S. at 486-87.

Other Courts of Appeals have differing views on how to determine the ordinary incidents of prison life. *See*, *Wagner v. Hanks*, 128 F.3d 1173, 1176 (7th Cir. 1997) (Posner, C.J.) (concluding that "atypical and significant" turned on a comparison with conditions in the state's most rigorous prison, but noting that *Sandin* might require a nationwide standard since state prisoners are frequently transferred to other state prisons under interstate compacts, and indicating that "clarification of the issue" from this Court would be "welcome"); *Griffin v. Vaughn*, 112 F.3d 703, 706 and n. 2 (3d Cir. 1997) (the "ordinary incidents of prison life" are ascertained by what a sentenced inmate may reasonably expect to encounter as a result of his or her conviction in accordance with due process of law); *Keenan v. Hall*, 83 F.3d 1083, 1088 (9th Cir. 1996) (suggesting that the baseline for determining "atypical and significant"

turns on the length of the deprivation and a comparison of conditions in segregation and that prison's general population); *Brooks v. DiFasi*, 112 F.3d 46, 48-49 (2d Cir. 1997) (same); *Luken v. Scott*, 71 F.3d 192, 193 (5th Cir. 1995), *cert. denied*, 517 U.S. 1196 (1996) (concluding that term in administrative segregation was not "atypical and significant" without discussing conditions in segregation or length of that term in segregation); *Mackey v. Dyke*, 111 F.3d 460, 463 (6th Cir.), *cert. denied*, 66 U.S.L.W. 3257 (1997) (concluding that six month term in administrative segregation was not "atypical and significant" without discussing conditions in segregation).

Some courts are conducting an exhaustive comparison of conditions in and out of segregation to ascertain if the prisoner experienced an atypical and significant deprivation, thus defeating *Sandin's* purpose to reduce the "involvement of federal courts in the day-to-day management of prisons." *See*, e.g., *Wagner*, 128 F.3d at 1176-1177 (remanding for development of factual record as to whether conditions in disciplinary segregation were more restrictive than conditions elsewhere in state's prison system); *Wright v. Coughlin*, 132 F.3d 133, 137 (2d Cir. 1998)(emphasizing need for district courts to conduct extensive fact finding before determining
whether a prisoner has a liberty interest in remaining free from segregated confinement).

3. Of course, atypicality, by itself, cannot establish a liberty interest. That much is clear from *Sandin*, which expressly reaffirmed the decision in *Meachum v. Fano*, 427 U.S. 215 (1976), which held that procedural due process was not required when an inmate was transferred from a medium security to a maximum security prison. 515 U.S. at 478. Therefore, local statutes and regulations must still form a part of the basis of any liberty interest concerning segregated confinement. See also, *Hewitt v. Helms*, 459 U.S. 460, 466-467 (1983) (the Due Process Clause itself does not implicitly create "an interest in being confined to a

general population cell, rather than the more austere and restrictive administrative segregation quarters"); *Montanye v. Haymes*, 427 U.S. 236, 242 (1976) (due process clause not implicated by state prisoner's transfer to another state prison for breach of prison rules, even where transfer involves "substantially burdensome consequences"); *Olim v. Wakinekona*, 461 U.S. 238 (1983) (inmate's transfer from Hawaii prison to less advantageous prison on mainland did not implicate liberty interest).

The District submits that, to prevail under *Sandin*, an inmate must establish both that 1) the confinement or restraint imposed an atypical and significant hardship as compared to the most restrictive prison nationwide, because that is what a sentenced inmate can reasonably expect to encounter as a result of his or her conviction in accordance with due process of law; and 2) the state has granted its inmates, by statute, an expectation in remaining free from that confinement or restraint absent certain defined substantive predicates. Neal's suggested approach, that "atypical and significant" is based on a determination of whether prison officials have discretion to place prisoners in similar settings, petition at 9-10, is an untenable attempt to return to the *Hewitt* methodology abandoned in *Sandin*.

4. But this case is not the case for resolving these issues because, under any plausible reading of *Sandin*, Neal was not deprived of a protected liberty interest here. As Judge Wald recognized below, spending six months in a cellblock where Neal was allowed out of his cell nine hours a day three days a week, for six and a half hours (or longer if he had a visitor) for two days a week, and for five and six hours respectively on the remaining two days, and where he was allowed a total of eight hours a week outdoors, is simply not the type of deprivation entitled to due process protections after *Sandin*. It is so whether the proper basis of comparison is the less restrictive general population at the Maximum Security Facility where Neal was eventually placed, the federal prison at Leavenworth where

Neal spent several years, or any other prison nationwide. This is especially so considering that protective custody in no way stigmatized Neal or diminished his parole prospects. *Cf., Sandin*, 515 U.S. at 488-489 (Ginsburg, J. dissenting) (noting that disciplinary confinement, but not protective custody, can diminish parole prospects).

The D.C. Circuit was absolutely correct that, after *Sandin*, there are certain restrictions and conditions of confinement that simply do not trigger the due process clause regardless of any regulations or statutes restricting the imposition of such conditions, and that the conditions imposed on Neal do not trigger the due process clause here. In short, Neal's administrative segregation was not so clearly out of the realm of prison experiences as to warrant due process protection. Further review is not warranted here.[5/]

[5/] Even if Neal could show here that he was subjected to an atypical and significant hardship within the meaning of *Sandin*, he still could not establish a liberty interest derived from the District's Lorton regulations. These regulations do not include any guidelines, standards, or rules restricting prison officials' determination as to when a prisoner should be considered a safety or security risk who needs protective custody. A prisoner may be placed in administrative segregation as a security matter if the prisoner poses an escape risk, is a danger to others, or the safety or health of the prisoner is threatened. 28 D.C.M.R.§§ 520.2-.4; App. 50a. However, the regulations do not define safety and security risks, and do not limit which factors prison officials can consider in making such a determination. Such a discretionary and open-ended determination cannot be construed to give rise to a liberty interest.

Further, Neal is not entitled to anything more than nominal damages, unless he can show he would have been promptly removed from segregated confinement if he had received appropriate due process. *Carey v. Piphus*, 435 U.S. 247 (1978).

II. BECAUSE OF THE UNIQUE CIRCUMSTANCES OF DISTRICT OF COLUMBIA PRISONERS, A DECISION BY THIS COURT HERE WOULD NOT NECESSARILY RESOLVE THE LEGAL ISSUE IN OTHER JURISDICTIONS.

Because District of Columbia prisoners are committed by statute to the custody of the Attorney General, who can place them in any federal or state prison in the country, this case is not necessarily the vehicle for determining a definition of the "ordinary incidents" of prison life under *Sandin* that would apply to state prisoners committed to state prison systems.

The District submits that *Sandin* should be applied in a fashion that creates a consistent nationwide standard for determining when a prisoner has a protected liberty interest to be free of segregated confinement. A definition of an "atypical and significant hardship" that is based on a state-by-state
-- or case-by-case, or prison-by-prison -- comparison of conditions (or as Neal would have it, a cellblock-by-cellblock comparison) would create different thresholds for a liberty interest in different jurisdictions depending on the conditions in that jurisdiction's prisons. Ironically, a prisoner in a restrictive, high security prison system might have fewer due process rights than a prisoner in a lower security prison system because the ordinary incidents of prison life would be more severe for the former prisoner. "Liberty that may vary from Ossining, New York, to San Quentin, California, does not resemble the 'Liberty' enshrined among 'unalienable Rights' with which all persons are 'endowed by their Creator.'" *Sandin*, 515 U.S. at 489 (Ginsburg, J., dissenting), quoting Declaration of Independence.

Further, a uniform nationwide standard makes sense considering that both federal and state prisoners are routinely transferred to other prisons. *Barden v. Keohane*, 921 F.2d 476 (3d Cir. 1990) (attorney general has broad discretion to choose place of federal prisoner's incarceration,

including choosing a state prison); *Wagner v. Hanks*, 128 F.3d at 1176 (states frequently "swap" prisoners with other states, and it "makes a good deal of sense to view the entire federal and state jail and prison system as a single system").[6/]

However, any resolution of the issues in this case that is based on the statutory authority of a national official -- the Attorney General -- to designate the place of confinement of D.C. prisoners in state, federal, or contract facilities, might have limited value as precedent for prisoners in other jurisdictions. Accordingly, a case involving a District of Columbia prisoner may not be the appropriate case to resolve the reach of *Sandin*.

In addition, the District notes that, under federal legislation, the Lorton Correctional Complex where Neal was incarcerated is mandated to be closed by 2001, so the "ordinary incidents of prison life" at Lorton itself will be obsolete at that time. See, Balanced Budget Act of 1997, Pub.L. 105-33 (Aug. 5, 1997), Title XI, National Capital Revitalization and Self-Government Act of 1997, Subtitle C, Criminal Justice, § 11201, D.C. Code § 24-1201 (providing for felons sentenced under D.C. law to be transferred to federal prisons and for Lorton to close by December 31, 2001).

Moreover, the prison regulations at issue in this case are applicable only to the Lorton Correctional Complex, "Lorton Regulations Approval Act of 1982," D.C. Law 4-153, 29 D.C.Reg. 3484-3485 (Aug. 13, 1982), and, the District submits, will no longer have any significance when Lorton is closed. Accordingly, a determination of whether

---

[6/] In addition, foreign prisoners can be transferred to their home countries to serve their sentences, suggesting that there could be an international standard of comparison. *Bagguley v. Bush*, 953 F.2d 660 (D.C.Cir. 1991), *cert. denied* 503 U.S. 995 (1992).

those regulations create a liberty interest will not have lasting impact even for the District of Columbia.[7/]

[7/] Any grant of certiorari in this case must necessarily involve review of whether the D.C. Circuit properly concluded that this case and the companion *Brown* case were cognizable under § 1983, and did not have to be pursued in habeas corpus under the dictates of *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Heck v. Humphrey*, 512 U.S. 477 (1994); and *Edwards v. Balisok*, 520 U.S. 641 (1997). In this regard, there is a conflict in the Circuits: *Clarke v. Stadler*, 121 F.3d 222, 226 (5th Cir. 1997) (if a favorable determination of prisoner's claim would not automatically entitle the prisoner to accelerated release, as where sanction included loss of good time credit, the proper vehicle for suit is § 1983), *rehearing en banc granted*, 133 F.3d 940 (1997); *Stone-Bey v. Barnes*, 120 F.3d 718 (7th Cir. 1997) (*Edwards* applies to preclude § 1983 claim in a case in which the prisoner was subject only to disciplinary segregation, and not to any loss of good time credits or any other change in the length of confinement); *Brown v. Plaut*, 131 F.3d at 168 and n.5 (finding *Stone-Bey* unpersuasive; endorsing approach of *Clarke*).

Here, the reasoning of *Preiser* and its progeny dictate that Neal's challenge to the administrative decisions to place him, and keep him, in segregated confinement cannot be brought under § 1983. A decision in Neal's favor here would necessarily imply the invalidity of the administrative decision to place and keep him in segregated confinement, and, as in *Preiser*, Neal's allegedly illegal confinement in protective custody could be challenged in a habeas corpus proceeding. *See*, *Hudson v. Hardy*, 424 F.2d 854, 855 and n.3 (D.C.Cir. 1970) (prisoner's claim that he was subject to cruel and unusual treatment in prison, apparently by being placed in control cell, could be brought as habeas corpus petition or as request for injunctive relief under 42 U.S.C. § 1983); and *Abdullah v. Roach*, 668 A.2d 801 (D.C. 1995) (habeas corpus challenge to administrative segregation). Accordingly, since Neal had a viable habeas corpus remedy to challenge the administrative action keeping him in cellblock #1, his claim is simply not cognizable under § 1983. The D.C. Circuit's judgment that Neal's complaint did not state a viable claim could be affirmed on the alternative ground that Neal had to pursue his claim in habeas corpus.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

JOHN M. FERREN
Corporation Counsel, D.C.

CHARLES L. REISCHEL
Deputy Corporation Counsel
Appellate Division

MARY L. WILSON
Assistant Corporation Counsel
Counsel of Record

Office of the Corporation Counsel
One Judiciary Square
441 4th Street, N.W.
Washington, D.C. 20001-2700
Tel: (202) 727-6252 ext. 3306

July 1998

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

97-1816

JAMES H. NEAL,
Petitioner,
v.
DISTRICT OF COLUMBIA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO BRIEF IN OPPOSITION

TABLE OF CONTENTS

A. D.C. Code § 24-402 (1996)

B. D.C. Code § 425 (1996)

C. The "Lorton Regulations Approval Act of 1982," D.C. Law 4-153, 29 D.C.Reg. 3484-3485 (Aug. 13, 1982)

D. Balanced Budget Act of 1997, Pub.L. 105-33 (Aug. 5, 1997), Title XI, National Capital Revitalization and Self-Government Act of 1997, Subtitle C, Criminal Justice, § 11201, D.C. Code § § 24-1201 (1996, 1998 supp.)

D.C. Code § 24-402. Imprisonment for more than 1 year; jurisdiction over Reformatory prisoners; transfer from penitentiary to Reformatory.

Whenever any person has been convicted of crime in any court in the District of Columbia and sentenced to imprisonment for more than 1 year by the court, the imprisonment during the term for which he may have been sentenced or during the residue of said term may be in some suitable jail, or penitentiary, or in the Reformatory of the District of Columbia; and it shall be sufficient for the court to sentence the defendant to imprisonment in the penitentiary without specifying the particular prison or the Reformatory of the District of Columbia; and the imprisonment shall be in such penitentiary, jail, or the Reformatory of the District of Columbia as the Attorney General shall from time to time designate; provided, that the Mayor of the District of Columbia is vested with jurisdiction over such male and female prisoners as may be designated by the Attorney General for confinement in the Reformatory of the District of Columbia from the time they are delivered into his custody or into the custody of his
authorized Superintendent, deputy, or deputies, and until such prisoners are released or discharged under due process of law; and provided further, that the residue of the term of imprisonment of any person who has prior to July 1, 1916, been convicted of crime in any court in the District of Columbia and sentenced to imprisonment for more than 1 year by the court may be in the Reformatory of the District of Columbia instead of the penitentiary where such persons may be confined on July 1, 1916, and the Attorney General, when so requested by the Mayor of the District of Columbia, is authorized to, and he shall, deliver into the custody of the Superintendent of said Reformatory or his deputy or deputies any such person confined in any penitentiary in pursuance of any judgment of conviction in and sentence by any court in the District of Columbia, and the Mayor of the District of Columbia is vested with jurisdiction over such

prisoners from the time they are delivered into the custody of said Superintendent or his duly authorized deputy or deputies, including the time when they are in transit between such penitentiary and the Reformatory of the District of Columbia, and during the period they are in such Reformatory or until they are released or discharged under due process of law. The Attorney General shall pay the cost of the maintenance of said prisoners so transferred, said payment to be from appropriations for support of convicts, District of Columbia, in like manner as payments are made for the support of District convicts in federal penitentiaries. Nothing herein contained shall be construed as applying to the National Training School for Boys or the National Training School For Girls.

D.C. Code § 24-425. Place of Imprisonment.

All prisoners convicted in the District of Columbia for any offense, including violations of municipal regulations and ordinances and acts of Congress in the nature of municipal regulations and ordinances, shall be committed, for their terms of imprisonment, and to such types of institutions as the court may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinements where the sentences of all such persons shall be served. The Attorney General may designate any available, suitable, and appropriate institutions, whether maintained by the District of Columbia government, the federal government, or otherwise, or whether within or without the District of Columbia. The Attorney General is also authorized to order the transfer of any such person from one institution to another if, in his judgment, it shall be for the well-being of the prisoner, or relieve overcrowding or unhealthful conditions in the institution where such prisoner is confined, or for other reasons.

The "Lorton Regulation Approval Act of 1982," D.C. Law 4-153, 29 D.C.Reg. 3484-3485 (Aug. 13, 1982)

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Lorton Regulations Approval Act of 1982."

Sec. 2. The Council of the District of Columbia approves the regulations setting forth the administrative procedures for adjustment and housing actions and the code of offenses governing residents of the Lorton Correctional Complex as adopted by the Director of Corrections on February 18, 1981, and published in the D.C. Register on February 27, 1981 (25 DCR 865).

Balanced Budget Act of 1997, Pub.L. 105-33 (Aug. 5, 1997), Title XI, National Capital Revitalization and Self-Government Act of 1997, Subtitle C, Criminal Justice, § 11201; D.C. Code § 24-1201 (1996, 1998 supp.).

(a) *Felons sentenced pursuant to the truth-in-sentencing requirements.* - Not later than October 1, 2001, any person who has been sentenced to incarceration pursuant to the District of Columbia Code or the truth-in-sentencing system as described in § 24-1211 shall be designated by the Bureau of Prisons to a penal or correctional facility operated or contracted for by the Bureau of Prisons, for such term of imprisonment as the court may direct. Such persons shall be subject to any law or regulation applicable to persons committed for violations of laws of the United States consistent with the sentence imposed.

(b) *Felons sentences pursuant to the D.C. Code.* - Notwithstanding any other provision of law, not later than

December 31, 2001, the Lorton Correctional Complex shall be closed and the felony population sentenced pursuant to the District of Columbia Code residing at the Lorton Correctional Complex shall be transferred to a penal or correctional facility operated or contracted for by the Bureau of Prisons. Such persons shall be subject to any law or regulation applicable to persons committed for violations of laws of the United States consistent with the sentence imposed, and the Bureau of Prisons shall be responsible for the custody, care, subsistence, education, treatment and training of such persons.

***

Supreme Court, U.S.
FILED
AUG 7 1998
OFFICE OF THE CLERK

(4)

No. 97-1816

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JAMES H. NEAL,

Petitioner,

v.

DISTRICT OF COLUMBIA
and
JOHN LATTIMORE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

DANIEL M. SCHEMBER
GAFFNEY & SCHEMBER, P.C.
1666 Connecticut Avenue, N.W.
Suite 225
Washington, D.C. 20009
(202) 328-2244

Counsel of Record for Petitioner

August 7, 1998

Washington, D.C. • THIEL PRESS • (202) 328-3286

HR

Respondent Presumes the Answer to, Rather than Addresses, the Question Presented

Respondent presumes that "after *Sandin* [*v. Conner*, 515 U.S. 472 (1995)], there are certain restrictions and conditions of confinement that simply do not trigger the due process clause," no matter what prison rules say, and that the only question to be decided is the federal constitutional standard defining what these restrictions and conditions are. Resp. Br. at 12. Respondent proposes that the federal standard be the conditions found in "the most restrictive prison nationwide." *Id.* at 11.

Under Respondent's proposal, local law could never create a liberty interest because, obviously, no confinement in the nation could ever be more restrictive than the most restrictive confinement in the nation. A more fundamental problem, however, is that Respondent's proposal presumes the answer to, rather than addresses, the question presented.

The question here is whether there is a "due-process-triggering threshold," Resp. Br. at 7, defined by certain restrictions and conditions of confinement, below which prison rules cannot possibly create a liberty interest. The court below erroneously held that there is such a threshold. It held that, as a matter of federal constitutional law, no prison rule can ever create a liberty interest against 30-days' solitary confinement, or any confinement deemed comparable, because that was the confinement that had been imposed on the prisoner in *Sandin*.

Sandin, however, announced no such holding. *See* Pet. at 6-7. The error of the court of appeals was that it read *Sandin* as if the issue that had been decided was whether the Constitution itself creates a liberty interest against 30-days' solitary confinement. Where a liberty interest is claimed to arise from prison rules, however, not the constitution itself, the relevant point is not the severity of the conditions *per se*, but their severity compared to the conditions that prison

officials may impose on a "totally discretionary basis." *Sandin*, 515 U.S. at 486; Pet. at 6-7.

Contrary to Respondent's Brief at 11, "determination of whether prison officials have discretion to place prisoners in similar settings" is not "*Hewitt* [*v. Helms*, 459 U.S. 460 (1989),] methodology abandoned by *Sandin*." The *Sandin* opinion said that *Hewitt* methodology was limited to determining whether substantive standards restrict officials' discretion to impose a particular type of confinement -- there, administrative segregation. *Sandin* held that substantive standards restricting officials' discretion to impose one type of confinement are not sufficient to create a liberty interest where the same officials can impose other types of equally-restrictive confinement, such as disciplinary segregation, on a totally discretionary basis.

Respondent's Other Arguments Lack Merit

Respondent erroneously argues that the prison rules here, Pet. at 3, n.1, are insufficiently specific to restrict discretion. Resp. Br. at 12, n.5. Respondent overlooks that segregation must be based on "factual information" showing a "definite" or "clear and present" escape risk or threat to safety. The trial court properly found that these standards restrict discretion, since the "substantive predicates ... are just as specific as those the Supreme Court considered in *Hewitt*." App. Pet. 31a. Respondent cites no authority to support its opposing view.

Respondent erroneously argues that the prison rules here cannot create a liberty interest because the Attorney General or high-level prison officials may transfer some prisoners outside the District of Columbia prison system. The prison officials who placed Mr. Neal in segregation did not have this transfer authority. That high-level prison population management decisions, unrelated to the behavior or circumstances of individual prisoners, might on occasion

supersede some institutional decisions does not preclude creation of a liberty interest for the prison population that remains in the prison system.[1]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Daniel M. Schember
Gaffney & Schember, P.C.
1666 Connecticut Ave., N.W.
Suite 225
Washington, D.C. 20009
202/328-2244

Counsel of Record for Petitioner

August 7, 1998

---

[1] Contrary to Respondent's view, the separate issue discussed in footnote 15 of Respondent's brief would not have to be addressed if certiorari were granted. Respondent declined to file a cross-petition raising this issue. It is not the court's obligation to cure Respondent's default.